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CANADIAN RAILWAY CASES.

CONTAINING

1854
A SELECTION OF CASES AFFECTING RAILWAYS RECENTLY DECIDED
BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,
THE SUPREME COURT AND THE EXCHEQUER COURT
OF CANADA, AND THE COURTS OF THE PROVINCES
OF CANADA, INCLUDING DECISIONS OF THE BOARD
OF RAILWAY COMMISSIONERS FOR CANADA,
PUBLISHED BY AUTHORITY OF THE
BOARD, WITH NOTES AND COMMENTS.

BY
ANGUS MACMURCHY, K.C.
AND
SHIRLEY DENISON
OF OSGOODE HALL, TORONTO,
BARRISTERS-AT-LAW.

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BOARD OF RAILWAY COMMISSIONERS FOR CANADA

1909 - 1910

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28th March, 1908.

D'ARCY SCOTT, Assistant Chief Commissioner

17th Sept., 1908.

The HON. M. E. BERNIER, Deputy Chief Commissioner

1st Feb., 1904.

JAMES MILLS, Commissioner

1st Feb., 1904.

S. J. McLEAN, Commissioner

17th Sept., 1908.

A. D. CARTWRIGHT, Secretary

1st Feb., 1904.

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Page 213, insert at end of case "*Malkin & Sons v. Grand Trunk R.W. Co.*,
8 Can. Ry. Cas. 183."

Page 224, line 12, for "and" read "nor."

Page 232, line 22, after "charges" insert "were."

Page 232, line 23, after "discriminatory" insert "and."

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CANADIAN RAILWAY CASES.

ANIMALS AT LARGE—DEFECTIVE FENCE.

ALBERTA.]

[HARVEY, J.]

WINTERBURN v. EDMONTON, YUKON & PACIFIC R.W. Co.

(1 Alta. L.R. 92.)

Fence Ordinance (N.W.T. 1903, 2nd session, ch. 28), sub-secs. 2, 7—Railway Act (R.S.C. 1906), ch. 37, sec. 254—Damage to crops by animals gaining access from right of way—Liability of railway company—Right of way not fenced.

Section 254 of the Railway Act requires the railway to fence its right of way under certain conditions, and sub-section 3 provides "such fences . . . shall be suitable and sufficient to prevent cattle and other animals from getting on the railway." Section 427 provides that "every company omitting to do any act or thing required to be done . . . is liable to any person injured thereby for the full amount of damages sustained by such omission."

Held, that where the railway company had not fenced its right of way adjacent to the plaintiff's lands, and cattle came in on such lands and caused damage to crops by reason of the company's neglect to erect fences, the railway company is liable notwithstanding that the rest of the lands are not enclosed by a "lawful fence." Remarks on Fence Ordinance (N.W.T. 1903, 2nd session, ch. 28), sub-secs. 2, 7.

MOTION for judgment on the verdict of a jury in an action for damages alleged to have been caused by reason of the neglect of the defendant railway company to erect fences.

This action was tried before Harvey, J., on the 25th day of February, 1908.

The facts sufficiently appear in the judgment.

O. M. Biggar, for defendant, cited sections 254, 294, 427, of Railway Act, ch. 37, R.S.C. 1906; 22 Vict. ch. 66, secs. 13 *et seq.* 147-9; 42 Vict. ch. 9, sec. 16; 46 Vict. ch. 24; 49 Vict. ch. 109, sec. 13; 51 Vict. ch. 29, sec. 194; C.O. (1905), ch. 77; *Elliott v. Buffalo & Lake Huron R.W. Co.*, 16 App. Cas. 289; *Bradly v. Great Western R.W. Co.* (1854), 11 U.C.R. 220; *Ferguson v. Buffalo & Lake Huron R.W. Co.*, 16 U.C.R. 289; *Bradly v. Grand Trunk R.W. Co.* (1865), 24 U.C.R. 350; *Nichol v.*

Canada Southern R.W. Co. (1873), 40 U.C.R. 583; *Young v. Huron and Erie R.W. Co.* (1896), 27 O.R. 531; *McKellar v. Canadian Pacific R.W. Co.* (1904), 3 Can. Ry. Cas. 322, 14 Man. L.R. 614; *James v. Grand Trunk R.W. Co.* (1900), 1 Can. Ry. Cas. 407, 31 S.C.R. 420; *Couch v. Steel* (1854), 23 L.J.Q.B. 121; [overruled by *Atkinson v. Newcastle* (1877), 2 Ex.D. 441]; *Buxton v. North Eastern R.W. Co.* (1868), L.R. 3 Q.B. 549; *Gorris v. Scott* (1874), L.R. 9 Ex. 125.

G. B. O'Connor, for plaintiff, cited *St. Louis R.W. Co. v. Sharp*, 13 Am. & Eng. R.R. Cas. 595; *Billing v. Semmens* (1904), 7 O.L.R. 340; *Lizotte v. Temiscouata R.W. Co.* (1905), 6 Can. Ry. Cas. 41, 37 N.B.R. 397; *Levesque v. New Brunswick R.W. Co.* (1889), 29 N.B.R. 588; *Masson v. Grand Junction R.W. Co.* (1879), 26 Gr. 286; *Routledge v. Wood*, 12 U.C.R. 63; *Nelson v. Minneapolis* (1889), 40 Am. & Eng. R.R. Cas. 234; *Pound v. Port Huron* (1884), 19 Am. & Eng. R.R. Cas. 640; *Emmons v. Minneapolis* (1888), 35 Am. & Eng. R.R. Cas. 126; *Davidson v. Grand Trunk R.W. Co.* (1903), 5 O.L.R. 574; (*James v. Grand Trunk R.W. Co.* (1900), 1 Can. Ry. Cas. 407, 31 S.C.R. 420, not followed); *Carruthers v. Canadian Pacific R.W. Co.* (1906), 6 Can. Ry. Cas. 16.

March 28, 1908. HARVEY, J.:—The defendants' line of railway crosses the land of the plaintiffs. During the construction of the railway, and later, its operation in 1906 and 1907, the fences along the highway at the crossing of the railway were torn down, and no fences were ever erected along the right of way through the plaintiffs' land. Cattle came in on the plaintiffs' land and caused damage to crops, and stacks of hay and grain. The action was tried before me, with a jury, and I instructed the jury that if they found that the cattle got on the land and caused damage by reason of the defendants' neglect to erect fences they were to assess the damages. The jury found a verdict in favour of the plaintiffs for \$1,202.50, on which the plaintiffs now move for judgment.

The evidence shewed that the rest of the plaintiffs' land was not surrounded by a lawful fence within the meaning of the Fence Ordinance, ch. 28 of 1903 (2nd session), and the defendants' counsel contends that the plaintiffs cannot recover by reason of section 2, which provides that "No action for damages caused by domestic animals shall be maintained nor shall domestic animals be liable to be distrained for causing damage to property unless the same is surrounded by a lawful fence." Counsel for the plaintiffs objects that this statute, not having been pleaded, cannot be taken advantage of. Apart from this objection and the consideration of permitting an amendment, it appears to me that the contention cannot be upheld. Section 7 is as follows: "The owner of any domestic animal which breaks into and enters upon any land surrounded by a lawful fence shall be liable to compensate the owner of such land for any damage done by such animal." It appears to me that section 2 contemplates actions against the owners of animals only, and that it can have no application to cases where the damage is caused by the wilful act or neglect of the defendant, even should he be the owner. If it were otherwise a person might deliberately tear down a fence and drive in cattle and escape liability, provided any portion of the fence did not answer the description of a "lawful fence." Indeed, it would seem to go even further, for though there might be a lawful fence everywhere when a part was torn down, there would be none there and hence the plaintiffs' action would be barred. I have no hesitation in declining to accept an argument which leads to such conclusions.

It was also suggested that under the Fence Ordinance the plaintiffs would have had the right to erect a fence and recover the cost from the defendants. In view of the obligation to fence imposed by the Railway Act, it would appear that the provisions of the Ordinance could not apply, but even if they did, the right to take this course would not involve the obligation to do so, and the failure to do so would not excuse the defendants' neglect.

The question to be determined then is, whether the damage suffered is one for which the defendants can be held liable in view of the provisions of the Railway Act, ch. 37 R.S.C. (1906), sec. 254, which prescribes what fencing, etc., shall be done by the railway, and sub-sec. 3, which is as follows: "3. Such fences, gates and cattle guards shall be suitable and sufficient to prevent cattle and other animals from getting on the railway," seems to indicate the object of the section, and it is urged that the damage suffered here does not come within the purview of the section, and the defendants cannot be held liable. It has, no doubt, been held that a railway company is only liable under this section for injuries done to animals on the railway, the latest case to which my attention has been called being *McKellar v. Canadian Pacific R.W. Co.* (1904), 3 Can. Ry. Cas. 322, 14 Man. L.R. 614; but that case was decided under the Act of 1888, in which the section corresponding to section 254, viz. 194, contained a provision declaring the company liable in case of neglect, "for all damages done by its trains and engines to cattle, horses and other animals not wrongfully on the railway." When the new Railway Act was passed in 1903 this provision was left out, and it is necessary to determine whether the effect of the amendment of the law by its omission is to extend the liability of the railway company to such cases as the present. For this purpose it seems useful to look at the conditions when the law was changed. The Railway Act in force at the time of Confederation, ch. 66 of the Consolidated Statutes of 1859, contained in section 13 very similar provisions to the section as to fencing contained in the Act of 1888, with similar provisions as to liability. It also contained another section 16, requiring under certain conditions the company to erect fences for the benefit of adjoining owners sufficient "to keep out cattle," etc., but without any penalty clause for failure. It was held by the Courts that neglect to comply with this provision rendered the company liable for damages by trespassing cattle. See *Nichol v. Canada Southern R.W. Co.* (1873), 40 U.C.R. 583. This provision was incorporated in the Ontario Railway Act and

is contained in the Revised Statutes of 1897. It was, however, dropped when the first federal Act was passed in 1868, and has never been incorporated in any Dominion Act. In 1888, however, section 289 was added declaring that "every company—omitting to do any matter, act or thing required to be done—is liable to any person injured thereby for the full amount of damages sustained by such omission." In view of the special and limited liability imposed by the section relating to fences, the liability of the company was not held by the Courts to be increased. In 1901, in the *Grand Trunk R.W. Co. v. James* (1900), 1 Can. Ry. Cas. 407; 31 S.C.R. 420, the Supreme Court of Canada considered the liability of the company under the then section 194, and at p. 431, Sedgewick, J., says: "The only penalty for breach of the requirements in regard to fences and cattle guards is that in the event of the company's neglect, the company shall be liable to the owner, not for all damages which may happen to him or his property, but only for the damage which he may suffer on account of animals killed or injured by the company's trains or engines."

This, then, was the state of the company's liability as declared by the Courts when less than two years later Parliament passed the Act of 1903. The omission of the liability clause, which had been in the section ever since Confederation, from the section in this must have been for some purpose, and the only reason I can see for it was to extend the liability by making applicable the general penalty section which was continued, and is to be found in the present Act as section 427.

If I am correct in this conclusion, the damages caused, being the natural and probable consequences of the defendants' neglect, there can be no doubt of this liability. A case very similar to this is *Pound v. Port Huron and South-Western R.W. Co.* (1884), 19 Am. & Eng. R.R. Cas. 640, where, at p. 641, it is stated: "How. Stat. 3377 requires every railway company to fence its right of way in such manner that cattle cannot get thereon. The evidence in this case shews that it was by getting upon

the right of way and passing therefrom into the plaintiffs' field that they were enabled to do the damage complained of. The right of way passed over the plaintiffs' land. It further appears that the premises where the property of the plaintiff was injured were well and securely fenced and sufficiently protected to secure the crops from injury and depredations by stock until the defendant entered upon the same and took down and away the fences and thus left the field to the inroads of cattle coming upon and across their right of way. In doing this the company incurred the liability claimed by the plaintiff." The provisions of the Michigan Act mentioned seem to be to the same effect as ours and with the same purpose indicated, and there is scarcely a word in the statement of the facts of the case which is not applicable to the present one.

In *Levesque v. New Brunswick R.W. Co.* (1889), 29 N.B.R. 588, the Supreme Court of New Brunswick held the company liable for damages caused by trespassing cattle for failure to comply with a statutory provision to fence. The only case I have found directly on the point since the Railway Act of 1903 is *Lizotte v. Temiscouata R.W. Co.* (1905), 6 Can. Ry. Cas. 41, 37 N.B.R. 397, in which the conclusion was the same as I have reached, but as the verdict which was asked to be set aside was for only \$3, and the Court, while refusing to set it aside, gave no reasons and expressed some doubt, it does not appear to be a very conclusive authority. The editor of the Canadian Railway Cases in his notes to the case on p. 53 says: "No penalty is now imposed in terms for breach of sec. 199 of the Act of 1903, now the equivalent of sec. 254 of the Act of 1906, and having regard to the law in other cases, namely, that each person must keep his cattle from trespassing, one would think that no damages other than those caused by the company's trains could be recovered." I cannot accept this conclusion. It assumes that the omission of the limited penalty clause by Parliament meant nothing. It seems to overlook the general penalty section, and as far as this province, at least, is concerned, a reference to the provisions of

the Fence Ordinance above quoted seems to indicate that the law as to cattle trespassing is not as he states.

For the reasons stated I am of opinion that the defendants are liable, and that the plaintiffs should have judgment in accordance with the verdict, and there will, therefore, be judgment for the plaintiffs for \$1,202.50, with costs. If the defendants against whom the action was abandoned have incurred any costs severable from those of the present defendants, such costs will be paid by the plaintiffs.

Judgment for plaintiffs.

Griesbach, O'Connor and Allison, solicitors for plaintiffs.

Short, Cross and Biggar, solicitors for defendants.

See next case.

ALBERTA.]

[SUPREME COURT.

WINTERBURN V. EDMONTON, YUKON & PACIFIC R.W. CO.

(1 *Alta. L.R.* 298.)

Railway law—Railway Act [R.S.C. (1906) ch. 37] secs. 254, 427—Fences—Omission to fence right of way—Liability of company for damage to adjoining landowner occasioned by animals gaining access from right of way—History of legislation—Fence Ordinance (N. W. T. 1903, 2nd session, ch. 28) secs. 2, 7—Pleading—History and effect of pleas of "Not guilty," and "Not guilty by statute"—Necessity of noting in margin statutes relied on—Construction of statutes.

Per CURIAM:—Where a statutory duty is imposed, neglect of the duty gives the party damaged thereby a right of action, unless the person damaged is excluded from a particular class of persons who are alone intended to be benefited by the statute.

The fences required to be erected by the railway company under sec. 254 of the Railway Act [R.S.C. (1906) ch. 37] are for all purposes which they may serve, and consequently, by virtue of sec. 427, the company is liable for all damage of whatever kind resulting from the omission to fence.

Held, affirming the judgment of Harvey, J., ante p. 1, that: "Where the railway company had not fenced its right of way, adjacent to the plaintiff's lands, and cattle came in on such lands, and caused damage to crops, by reason of the company's neglect to erect fences, the railway company is liable notwithstanding that the rest of the lands are not enclosed by a 'lawful fence.'"

Per STUART, J.:—The Fence Ordinance (N. W. T. 1903, 2nd session, ch. 28) has no application to a case where it is the duty of the person charged with damage to maintain that portion of the fence through which animals doing damage have entered. It makes no difference whether the rest of the lands are fenced or not.

History and effects of the pleas of "Not guilty," and "Not guilty by statute." traced and discussed.

The necessity of noting in the margin of the plea, the statute permitting the plea, and the particular statute relied on, discussed, with remarks *ab inconvenienti* in respect of these pleas: *Toll v. Canadian Pacific R.W. Co.*, 1 Alta. L.R. 244, 8 Can. Ry. Cas. 291, *quære*.

(*Court en banc*, July 24th, 1908.)

THIS was an appeal by the defendants from the judgment of Harvey, J., reported 1 Alta. L.R. 92, upon the following grounds:

(1) That the learned trial Judge erred in holding that the plaintiffs were not required to have a lawful fence before being entitled to recover.

(2) That the learned trial Judge erred in holding that the plaintiffs were under no obligation to fence the lands in question with a lawful fence.

(3) That the defendants were not liable to erect any fences dividing their lands from the lands of the plaintiffs.

(4) That if the defendants were liable to fence the said lands, it was a liability only to fence them to prevent cattle getting upon the railway.

(5) That the learned trial Judge erred in holding that the defendants were liable to the plaintiffs for the damage complained of.

July 17, 1908.

O. M. Biggar, for the appellants.

The defences raised are two:—

(1) That the land, not having been surrounded by a lawful fence as required by section 2 of the Fence Ordinance [C.O. (1905), ch. 77], the defendants are not liable even though the damage was due to their breach of a statutory duty to fence.

(2) That there was no duty upon the defendant to fence so as to prevent cattle straying from its lands upon the lands of the plaintiff.

(1) At common law the owner of the cattle was bound to prevent them from straying, and cattle trespassing upon land were liable to be distrained *damage feasant* unless, as occasionally happened, as, *e.g.*, where the land adjoined a highway, there was a duty upon the landowner to keep his fences in good repair, and he had neglected to perform it.

Dovaston v. Payne (1795), 2 H. Bl. 527, 3 R.R. 497; *Churchill v. Evans* (1809), 1 Taunt. 529, 10 R.R. 600; *Hilton v. Ankesson* (1872), 27 L.T.N.S. 519.

By the Fence Ordinance this duty to fence—and a duty to fence in a particular way—is imposed upon every landowner who desires to recover damages for injuries done upon his land by trespassing cattle, or to exercise his right of distraining cattle *damage feasant*.

The plaintiff's land was not "surrounded by a lawful fence;" and, therefore, by the terms of the Ordinance, no action for damages caused by domestic animals can be maintained.

It is claimed on behalf of the plaintiff that in spite of his having no lawful fence of his own, it is still open to him to shew that the cattle came upon the land not over or through his own insufficient fence, but at a point where it was the duty of the defendants to have erected a fence. It is submitted that this is incorrect.

The distinction made by the learned trial Judge between actions against the owners of trespassing animals and such an action as the present, with which the owners of the trespassing animals have nothing to do, is, it is submitted, wholly illusory. The question is whether, if an action were brought by the land owner against the owner of trespassing cattle to a defence alleging that no lawful fence surrounded the land, it would be sufficient to reply by a plea in confession and avoidance on the ground that the cattle obtained ingress through or over a portion of the fence which was lawful.

The object of the statute must surely have been to prevent owners from recovering on their own statement of how cattle obtained access to their lands—statements which the defendant

could have no opportunity of contradicting—and to compel him, in order to recover, to have a lawful fence completely surrounding the land.

If the conclusion is right with regard to an action against the owner of the trespassing cattle, it must necessarily apply when the action is brought against some other person than the owner. The learned trial Judge's suggestion that, from the opposite conclusion would follow the exoneration of a person who deliberately tore down a fence and drove in cattle is clearly erroneous, since in that case the defendant must have himself committed a trespass upon the plaintiff's land by tearing down the fence, and would be liable for the natural consequence of that trespass.

Liability to Fence under the Railway Act.

(2) Apart from the Railway Act the company is under no obligation to fence, unless it desired to obtain damages for injuries done by trespassing cattle, and the liability under the Railway Act is no greater than is necessary for the purpose of effecting the intention of the legislature in imposing it.

See *Ricketts v. The East & West India, etc., Railway* (1852), 21 L.J.C.P. 201, 12 C.B. 160, 7 Ry. Cas. 295, 16 Jur. 1072; *Luscombe v. Great Western Railway Company* (1899), 2 Q.B. 313, 68 L.J.Q.B. 711, 81 L.T. 183.

The history of the legislation on this subject is as follows:—

By 14 & 15 Vict. ch. 51 [C.S.U.C. (1859), ch. 66], a two-fold duty in respect of fences was imposed upon railway companies; section 13 of the Consolidated Statute, as interpreted in *Elliott v. Buffalo & Lake Huron Ry. Co.* (1858), 16 U.C.Q.B. 289, compels the company to fence in their track so that cattle might not get upon it and be injured by the trains; while section 19 provided for the separation of all the lands taken by the company from the lands of adjacent proprietors, so that the latter might not be subject to trespass by cattle escaping from the company's land.

See also *Bradly v. Great Western Railway Company* (1854),

11 U.C.Q.B. 220; *Nichol v. Canada Southern Railway Company* (1877), 40 U.C.Q.B. 583; *Brown v. The Grand Trunk Railway Company* (1865), 24 U.C.Q.B. 350.

In 1868, by the Railway Act of that year, 31 Vict. ch. 68, the former sections 13 and 19 were combined, and railway companies were required, if requested by the adjoining proprietors, to erect fences on each side of the railway and cattle guards at all road crossings suitable and sufficient to prevent cattle and animals from getting upon the railway, and it was enacted that until these fences and cattle guards were duly made, the company should be liable for all damages which might be done by their trains or engines to cattle, horses or other animals upon the railway.

This provision was further amended in 1883 by 46 Vict. ch. 24, sec. 9, and as then enacted reappeared with some verbal alterations in the Revised Statutes of 1886, ch. 109, sec. 13. It was further amended in 1888 by 51 Vict. ch. 29, sec. 194, and still further in 1890 by 53 Vict. ch. 28, sec. 2, but up till 1903 it contained the clause that upon default the company should be liable for damage done by trains and engines.

In view of this limitation it was held that damage done by trespassing cattle as in this case was not recoverable.

Young v. Erie & Huron Railway Company (1896), 27 O.R. 530; *James v. Grand Trunk Railway Company* (1901), 31 O.R. 672, 1 O.L.R. 127, 1 Can. Ry. Cas. 407, 409; *Grand Trunk Ry. Co. v. James*, 31 S.C.R. 420, 1 Can. Ry. Cas. 422.

In 1903 the Act was put into its present form (3 Edw. VII. ch. 58, sec. 199), and appears as sec. 254 of R.S.C. (1906), ch. 37, which provides that the railway companies "shall erect and maintain upon the railway fences . . . suitable and sufficient to prevent cattle and other animals from getting on the railway." The provision as to liability is omitted from the section and a new provision inserted as sub-sec. 4 of sec. 237 of the Act of 1903, a further change being made in this respect in 1906 by section 294 of the present Act.

It is contended on behalf of the plaintiff that the omission

of the penalty for default has altered the law so that the requirements are now the same as they had been prior to confederation, and that the railway is now bound to erect the division fence of the quality and kind referred to, as to separate its land from the lands of adjoining proprietors.

To consider the purposes for which the legislature might have imposed upon them obligation to fence, and the extent of their liability :—

(a) *Protection of animals from injury by trains.*

- (1) This has always been in terms the statutory purpose in regard to animals belonging to adjoining proprietors; but
- (2) The extent of the liability to include the animals of other than adjoining proprietors only began in 1890 when sec. 194(3) of 51 Vict. ch. 29 was by 53 Vict. ch. 28, sec. 2, extended to the case of an animal getting upon the railway from an adjoining place where under the circumstances it might properly be, further extended by section 237(4) of the Railway Act, 1903, and still further by section 295 of the Railway Act of 1906. Even under the Act of 1903 there still remained a doubt.

See judgment of Phippen, J.A., *Carruthers v. Canadian Pacific Railway Company* (1906); 16 Man. L.R. 323, 39 S.C.R. 251, 6 Can. Ry. Cas. 13, 15, 7 Can. Ry. Cas. 23.

That doubt has probably now been set at rest.

(b) *Protection of animals from other injuries.*

- (1) Belonging to adjoining proprietors. No liability unless resulting from actual contact with train, prior to 1903.

See *McKellar v. Canadian Pacific Railway Co.* (1904), 3 Can. Ry. Cas. 322, 14 Man. L.R. 614.

But this liability has probably existed since 1903, though *quære* as to effect of section 295 of the Act of 1906.

For the law in England see *Dixon v. Great Western Ry. Co.* (1896), 2 Q.B. 333, (1897) 1 Q.B. 300, 66 L.J.Q.B. 132, 75 L.T. 539, 45 W.R. 226.

(2) No matter to whom the animals belong.

The remarks above in regard to prevention of injuries to animals other than those of adjoining proprietors by trains or engines apply equally under this head.

(c) *Prevention of injuries to passengers by reason of collision with stray animals.*

Question not considered in Canada, but see *Buxton v. North Eastern Ry. Co.* (1868), L.R. 3 Q.B. 549, 9 B. & S. 824, 37 L.J.Q.B. 258, 18 L.T. 795, 16 W.R. 1124.

(d) *Prevention of animals escaping from adjoining lands.*

This was not covered at all events until the year 1903. *James v. Grand Trunk Ry. Co.* (1901), 31 O.R. 672, 1 O.L.R. 127, 1 Can. Ry. Cas. 407, 409: see also *Grand Trunk Ry. Co. v. James*, 31 S.C.R. 420, 1 Can Ry. Cas. 422.

(e) *Prevention of animals escaping from the railway lands into adjoining lands.*

To come to a conclusion that this is involved in the duty imposed, it is necessary:—

1. To read into the statute a direction to make a division fence dividing the company's lands from adjoining lands.
2. To interpret the word "railway" not in its proper sense of a way on rails, but in the sense of "the railway lands," making the word "railway" an adjective, and reading the word "lands" into the statute after it, and so to require the fencing of station grounds, freight yards, etc., etc.
3. To require the railway to fence its lands underlying bridges and trestles, although no possible danger could come to animals by reason of the absence of the fence.
4. To compel the railway to retain upon its right of way any animals which may have got there and to prevent it from so building its fence that animals although they cannot come upon the right of way can nevertheless get off it.

The only case upon the subject is a case of *Grand Trunk v. James*, 31 S.C.R. 420, 1 Can. Ry. Cas. 422.

Counsel analyzed this case, and distinguished the cases referred to in the judgment of Harvey, J.

In *Pound v. Port Huron and South Western Railway Company* (1884), 19 Am. & Eng. Ry. Cas. 640, the statute required the railway company to fence its right of way, and so the statute under consideration in *Levesque v. The New Brunswick Railway Co.* (1889), 29 N.B.R. 588, required fences to be erected "on each side of the land taken for the railway." *Lizotte v. Temiscouata Railway Co.* (1906), 37 N.B.R. 397, 6 Can. Ry. Cas. 41, cannot, as the learned trial Judge very properly points out, be considered an authority on the point in dispute.

And he submitted: 1. That this judgment of Mr. Justice Sedgewick and the Chief Justice of Canada was correct; 2. That from a consideration of the statutes in force from time to time it appears that was never the intention to require division fences, but only fences to protect animals from injury due to the dangerous business carried on by the railway upon its lands; 3. That the alteration of the section in 1903 was not made with any intention to change the law.

Reference was also made to *Gorris v. Scott* (1874), L.R. 9 Ex. 125, 43 L.J. Ex. 92, 30 L.T. 431, 22 W.R. 575; *Couch v. Steel* (1853), 23 L.J.Q.B. 121, 3 El. & Bl. 402, 2 C.L.R. 940, 18 Jur. 515, 2 W.R. 170; *Atkinson v. Newcastle and Gateshead Water Works Company* (1877), 2 Ex. Div. 441, 46 L.J. Ex. 775, 36 L.T. 761, 25 W.R. 794 (C.A.).

G. B. O'Connor, for respondent.

The Fence Ordinance does not prohibit this action. Section 2 applies only to actions against the owners of trespassing cattle. Cf. the words "liable to be distrained"; and the language of section 7: *Gorris v. Scott* (1874), L.R. 9 Ex. 125, 43 L.J. Ex. 92, 30 L.T. 431, 22 W.R. 575.

This action is not for "damages caused by domestic animals," it is for damages caused by the breach of statutory duty to fence:

St. Louis & San Francisco Railway Co. v. Sharp (1881), 13 Am. & Eng. Ry. Cas. 595, 27 Kansas R. 134.

The Fence Ordinance is not pleaded, and is not noted in the margin to the plea, "Not guilty by statute," and the trial Judge rightly refused to allow it to be added by amendment. On a fair construction of section 254 of the Railway Act there is a duty to fence—and the company is liable for its default under section 427. Sub-section 3 of section 254 does not limit the liability. Counsel here reviewed the history of this section from pre-confederation days up to the present statute, citing *Lizotte v. Temiscouata* (1906), 37 N.B.R. 397, 6 Can. Ry. Cas. 41; *Levesque v. New Brunswick Ry. Co.* (1889), 29 N.B.R. 588, and distinguished; *Blakslee v. St. John Water Co.*, 1 All. 639; *Gibson v. Mayor of Preston* (1870), L.R. 5 Q.B. 218, 10 B. & S. 942, 39, L.J.Q.B. 131, 22 L.T. 293, 18 W.R. 689; *Hammond v. Vestry of St. Pancras* (1874), L.R. 9 C.P. 316, 43 L.J.C.P. 157, 30 L.T. 296, 22 W.R. 826; *Atkinson v. Newcastle Waterworks* (1877), 2 Ex. Div. 441, 46 L.J. Ex. 775, 36 L.T. 761, 25 W.R. 794 (C.A.); *Vallance v. Falle* (1884), 53 L.J.Q.B. 459, 13 Q.B.D. 109, 51 L.T. 158, 32 W.R. 769, 5 Asp. M.C. 280, 48 J.P. 519; from the cases such as *Couch v. Steele* (1853), 23 L.J.Q.B. 121, 3 El. & Bl. 402, 2 C.L.R. 940, 18 Jur. 515, 2 W.R. 170, questioned to some extent in *Atkinson v. Newcastle Waterworks* (1877), 2 Ex. Div. 441, 46 L.J. Ex. 775, 36 L.T. 761, 25 W.R. 794 (C.A.), which hold that the breach of a public duty gives a right of action to persons specially damnified.

It is a matter of construction of the particular statute; cf. *Hammond v. Vestry of St. Pancras* (1874), L.R. 9 C.P. 316, 43 L.J.C.P. 157, 30 L.T. 296, 22 W.R. 826.

From decisions of the Ontario Courts he cited: *Masson v. Grand Junction Ry.* (1879), 26 Gr. 286; *Rutledge v. Woodstock and Lake Erie Ry.* (1855), 12 U.C.R. 663; *Bradly v. G. W. Ry.* (1854), 11 U.C.Q.B. 220; *Young v. Erie* (1896), 27 O.R. 530; *James v. Grand Trunk Ry.* (1901), 31 O.R. 672, 1 O.L.R. 127, 1 Can. Ry. Cas. 407, 409, pointing out that the present section is radically different from that discussed in the last cited case.

• In England, *Williams v. G. W. R.* (1885), L.R. 9 Ex. 157, 52 L.T. 250, 49 J.P. 439, and in the United States, *Pound v. Port Huron Ry.* (1884), 19 Am. & Eng. Ry. Cas. 640, furnish instructive analogies on the construction of the statute.

The danger of construing a section by reference to a single obscure expression is well shewn by one of the arguments of counsel. He argues that sub-section 4 shews an intention to protect only the adjoining lands from trespass inasmuch as cattle are more likely to be at large where there are no fences on the surrounding lands than where the adjoining land is fenced, and yet the section dispenses with fences in the former case and requires it in the latter where the lands are sure to be improved.

Probably this is fallacious, but it is not more so than the contention of counsel for the defence based on sub-section 3.

The words of Pollock, Baron, are particularly apt: "It is not for us to speculate what was the precise intention of the Legislature when they required a gate or stile."

Even if the Act was primarily passed to protect the owner of cattle, it by no means follows that the railway company is not liable for trespass to the lands of adjoining proprietors owing to the default of the company. If they had kept cattle off their right of way this action would not have been necessary.

• *Cur. adv. vult.*

July 24, 1908. BECK, J.:—Judgment was entered on the trial of this action by Mr. Justice Harvey upon the verdict of the jury for \$1,202.50 and costs against the defendants, the Edmonton, Yukon & Pacific Railway Company, the action being dismissed as against the other defendants.

The action was to recover damages arising by reason of the defendants in the course of the construction of their railway breaking down the plaintiff's fences and omitting to fulfil their statutory duty to erect fences on each side of their railway where it intersected the plaintiff's land in consequence whereof straying cattle passed from the railway right of way on to the defendant's lands. The case went to the jury and was considered by

the learned trial Judge evidently without objection on either side solely as grounded upon the defendants' breach of their statutory duty. The damages were sustained during the autumn of 1906 and the spring of 1907. The question of the liability of these defendants depends upon the meaning of section 199 of the Railway Act of 1903 (3 Edw. VII. ch. 58), which in the Railway Act [R.S.C. (1906), ch. 37], which came into effect on the 31st January, 1907, has become section 254. The difference between the wording of the sections is not of importance in considering the present case. Section 199 of the Act of 1903 is as follows:—

The company shall erect and maintain upon the railway fences, gates and cattle-guards, as follows:—

“(a) Fences of a minimum height of four feet six inches on each side of the railway.

“(b) Swing gates in such fences, of the minimum height aforesaid, with proper hinges and fastenings, at farm crossings; provided that sliding or hurdle gates, already constructed, may be maintained.

“(c) Cattle-guards, on each side of the highway, at every highway crossing at rail-level by the railway. The railway fences at every such crossing shall be turned into the respective cattle-guards on each side of the highway.

“2. Such fences, gates and cattle-guards shall be suitable and sufficient to prevent cattle and other animals from getting on the railway.

“3. Whenever the railway passes through any locality in which the lands on either side of the railway are not improved or settled, and inclosed, the company shall not be required to erect and maintain such fences, gates and cattle-guards unless the Board otherwise orders or directs. 51 Vict. ch. 29, sec. 194, and 55-56 Vict. ch. 27, sec. 6 (Am.).”

Section 294 of the Act of 1903, which has become section 427 of the R.S.C. of 1906, is as follows:—

“The company, or any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for or employed

by the company, doing, causing or permitting to be done, any matter, act or thing contrary to the provisions of this or the Special Act, or to the orders or directions of the Governor-in-Council, or of the Board or Minister made hereunder, or omitting to do any matter, act or thing required to be done on the part of any such company, or person, is liable to any person injured thereby for the full amount of damages sustained by such act or omission; and if no other penalty is, in this or the Special Act, provided for any such act or omission, is liable, for each offence, to a penalty of not less than twenty dollars, and not more than five thousand dollars, in the discretion of the Court before which the same is recoverable. 51 Vict. ch. 29, sec. 289, sub-sec. 1 (Am.).''

I think the law is that where a statutory duty is imposed the neglect by the party upon whom the duty is imposed to fulfil the duty gives a right of action to any party sustaining damage in consequence of the breach of the statutory duty unless the terms of the enactment are such as clearly indicate that the statutory duty is imposed only for the benefit of a class of persons of which the plaintiff is not one or only to avoid certain consequences in which those complained of are not included. The cases were discussed at length during the course of the argument, and a number of them are annotated and noted in 19 R.C., pp. 42 *et seq.*

It was contended on behalf of the appellants (the Edmonton, Yukon and Pacific Railway Company) that the enactment now under consideration does disclose that its intention was that the fences, the duty of constructing which is imposed upon the railway company, are for the purposes of preventing animals getting upon the railway right of way and being injured thereon, and not for the purpose of preventing them passing from the railway right of way on to the lands of adjoining owners, and doing damage thereon. This contention was based principally upon the history of the legislation with reference to fences commencing with the Statutes of Canada, C.S. Can. (1859), ch. 66, and decisions upon the Acts preceding the Act of 1903.

In my opinion the differences between the provisions with

regard to fences as they stand in the Act of 1903, and the earlier provisions with regard to the same matter, are such as to make the decisions upon the earlier provisions inapplicable to the present provisions. I can find no intention disclosed in section 199, that the fences required to be erected are not intended for all purposes which they may serve. If, therefore, the section stood alone, I should so hold, but the correctness of this view is, it seems to me, put beyond question by the provisions of section 294 of the Act of 1903 already quoted. Its terms are quite general. "The company . . . omitting to do any matter, act, or thing, required to be done on the part of any such company . . . is liable to any person injured thereby for the full amount of damages sustained by such . . . omission."

This view is supported by *Levesque v. N. B. Ry. Co.* (1889), 29 N.B.R. 588, and *Lizotte v. Temiscouata Railway Company* (1906), 37 N.B.R. 397, 6 Can. Ry. Cas. 41.

The opinion I have expressed is that of the learned trial Judge merely expressed in different form. I think, therefore, the appeal should be dismissed with costs.

SIFTON, C.J., and SCOTT, J., concurred.

STUART, J.:—It was argued on behalf of the respondent that the appellants were not entitled to rely in any way upon the provisions of the Fence Ordinance, because that Ordinance had not been specially pleaded. In answer to this the appellants contended that having pleaded "not guilty by statute," they were entitled to set up any defence which might be available to them under that Ordinance. The effect of this plea has not so far as I have been able to discover, been considered either by this Court or by the previously existing Territorial Court, and it may be advisable to say something, not in the hope of clearing the whole point up, which would be very difficult, but rather perhaps to shew in how unsatisfactory a condition, at least, in my view, the whole matter stands. At the outset I am very glad to have this opportunity of saying that on a closer examination of the matter

it has become fairly clear to me that I perhaps went astray in the decision I gave in the case of *Toll v. Canadian Pacific Railway Company* (1908), 1 Alta L.R. 244, which will presently be reviewed by the other members of this Court.

It is clear that at common law a defendant by pleading the general issue, which in an action on the case for a tort took the form of a plea of "not guilty," could raise by his evidence almost any kind of a defence, including even matter which ordinarily would have to be pleaded as matter of confession and avoidance. After a more careful examination of such authorities as are available here, I have been unable to discover the exact extent of the limitation implied in the word "almost" which is continually used as I have just used it, in referring to the character of the defences allowable under the plea in question.

By rule of Court of Hilary Term, 4 Wm. IV., it was ordered that in actions on the case the plea of "not guilty" should operate only as a denial of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the indictment, and that no other defence than such denial should be admissible under that plea. This rule was made, however, in pursuance of the Act 3 & 4 Wm. IV. ch. 42, sec. 1, which provided that no such rule or order should have the effect of depriving any person of the power of pleading the general issue, and of giving the special matter in evidence in any case wherein he then was or thereafter should be entitled so to do, by virtue of any Act of Parliament, then or thereafter to be in force: see *Haine v. Davey et al.* (1836), 6 N. & M. 356, 4 A. & E. 892, 2 H. & W. 30. In *Williams v. Jones* (1839), 11 A. & E. 643, quoted in *Mason v. Mossop* (1870), 29 U.C.Q.B. 500 at p. 505, Lord Denman, C.J., said: "I thought that the plea put in issue nothing but the defence which the statute gave and had not the effect of an ordinary plea of 'not guilty.' But that construction has since been held erroneous." In *Maund v. Monmouthshire Canal Co.* (1842), 1 Car. & M. 606, 4 Man. & G. 452, 3 Ry. Cas. 159, 2 D. (N.S.) 113, 5 Scott (N.R.) 457, 11 L.J.C.P. 317, 6 Jur. 932, Cresswell, J., said: "My brother Patteson informs

me that fourteen Judges had a meeting to settle the question as to what could be given in evidence under the plea of 'not guilty by statute,' and he tells me that the majority of the Judges were of opinion that every defence that could be specially pleaded, whether founded entirely on the statute, or partly on the statute, and partly not, or if it was a defence wholly independent of the statute, may be given in evidence under the plea of 'not guilty by statute.' "

These decisions apparently settled the practice, and in *Toll v. C. P. R.* (1908), 1 Alta. L.R. 244, I was possibly led astray by a chapter in Chitty on Pleading, published in 1847, before the Common Law Procedure Act, which on the face of it appears to be dealing with the old common law plea of "not guilty," which was originally as wide as the latter plea of "not guilty by statute" continued to be, and makes no reference to the limitation of the common law plea by the rules of 1834.

It was in 1836 that a rule was passed providing that where a defendant shall plead the general issue intending to give the special matter in evidence by virtue of an Act of Parliament, he shall insert the words "by statute" in the margin of such plea. And again in 1853 this rule was enlarged so as to provide that the particular Act and section thereof, and whether the Act was public or otherwise, should also be inserted in the margin. At the same time, I would gather, for the rule appears in Upper Canada in 1856, a rule was made that nothing in these rules shall affect the right of any defendant to plead "not guilty by statute," and every such defence of "not guilty by statute" shall have the same effect as a plea of "not guilty by statute" has heretofore had, but if the defendant so plead he shall not plead any other defence without the leave of the Court or a Judge. These rules now appear as Order 19, rule 12, and Order 21, rule 19, of the English Rules of 1883, and the former appears as our rule 113, while the latter is in force here, of course, by virtue of section 21, of the Judicature Ordinance.

Now it is at first sight difficult to understand why it was thought necessary to provide that a defendant who pleads "not

guilty by statute," should not plead any other plea, except by leave, for it was plain that if the plea had the effect of the old common law plea of the general issue there never would, at least, in any case which can at this date be imagined, be any need of pleading specially. It will appear, however, from an examination of such cases as *Ross v. Clifton* (1841), 11 A. & E. 631; *Legge v. Boyd* (1840), 10 L.J.C.P. 19, 1 M. & G. 898; *Neale v. MacKenzie* (1837), 6 L.J. Ex. 263, that defendants were attempting to plead "not guilty," by virtue of the liberty given by some statute so to do, and to add special pleas also, and that the Courts found it necessary to discourage the practice, and it was no doubt as a further discouragement that the direct rule was made in 1853. Speaking for myself I am bound to say that I shall hereafter incline very strongly towards the views adopted by the Courts in the cases I have cited and to refuse such leave when it is applied for—because while it may be said that a defendant is only desiring to put the plaintiff on his guard by pleading specially, it really may work out in practice just in the opposite direction by "drawing a red herring across the plaintiff's track," to use a popular expression, and inducing him to believe that the special plea is that upon which the defendant really intends to rely, whereas something altogether different may be put forward at the trial under the general issue, as was in fact done in this case with which I am now dealing.

Assuming however, that the defendants here were permitted under the plea of "not guilty by statute" to raise this defence under the Fence Ordinance, it is not quite clear that they were entitled in any case to plead not guilty by statute. In most of the old statutes which gave liberty to plead this remarkable plea it will be noticed that the words are generally to this effect. "In any action brought for anything done in pursuance of this Act the company may plead the general issue and give the special matter in evidence, etc., etc." There are authorities such as *March v. Port Dover & Otterville Road Co.* (1857), 15 U.C.Q.B. 138, which shew that where the statute allowing the plea is couched in these words, the action must be for something done

and not for an omission or a misfeasance and not for a nonfeasance before the plea of the "not guilty by statute" is allowable at all. The section of our Railway Act, ch. 37 of the Revised Statutes, allowing the plea, is drawn in much more general terms.

Section 306, sub-section 1, says: "All actions or suits for indemnity for any damages or injury sustained by reason of the construction or operation of the railway shall be commenced within one year, etc.," and sub-sec. 2, says: "In any such action or suit, the defendant may plead the general issue, etc." Now if the damages had been alleged by the plaintiff to have been suffered solely by reason of the failure of the defendants to put up the line fence, it could not possibly have been said that the damages alleged were suffered by reason either of the construction or of the operation of the railway. It would be a mere nonfeasance and, under the authorities I have referred to, the right to plead "not guilty by statute" would apparently not arise at all. On the other hand it is to be observed that the plaintiffs allege both an actual breaking of the plaintiff's fences and an omission to build the line fence, and in paragraph 5 the damage is alleged to have arisen "by reason of the breaking down of the fences aforesaid and the omission aforesaid to erect fences, etc." It is clear that in answer to the charge of breaking down the fences the defendants would be entitled to plead "not guilty by statute." Whether the plea of not guilty by statute and any other defence made available by this plea should not be confined strictly to the charge of breaking down the fences, might be a grave question to decide. If the plea, and the consequently available defence, were so confined there might be a further grave question to decide as to whether, in view of the turn the case took at the trial, the defendants should now be given any rights under that plea. There is a further lesser question as to the form of the plea itself. The rule is clear that the Act relied upon must be noted in the margin. So far as the Railway Act is concerned, it will be observed that instead of noting this in the margin the defendants have referred to it in a separate paragraph of the defence. It seems to be the rule that the statute

allowing the plea as well as the special Act relied upon as permitting the act complained of, must both be noted in the margin. See *Van Natter v. Buffalo & Lake Huron Railway Company* (1868), 27 U.C.Q.B. 581, at p. 587. But it is also decided that even after verdicts on motion for judgment or a new trial the Court will permit the defendant to add the necessary note in the margin. See *Edwards v. Hodges* (1841), 15 C.B. 477, 3 C.L.R. 472, 24 L.J.M.C. 81, 1 Jur. (N.S.) 91, 3 W.R. 112.

I have said this much about the "plea of not guilty by statute" in order to shew how much difficulty is likely to arise from the continuance of this antiquated plea as part of our practice and as a reason for expressing my own personal hope that it may soon disappear.

I prefer not to express any final opinion as to whether or not the defence arising in this case from the terms of the Fence Ordinance is open to the defendants under the plea of "not guilty by statute," chiefly because, as I have said, it is difficult to discover at this late date the exact limitation attached several hundred years ago to the old common law plea which certain statutes have preserved apparently for a very limited class of defendants.

Upon the merits of the appeal, even admitting the right of the defendants to raise this defence, I have come to the conclusion, though with some hesitation, that the appellants must fail. If the Railway Act as it now stands were a new piece of legislation and we were asked to gather the purpose of section 254 without reference to previous legislation, it seems to me that it would have been perfectly clear that the object which Parliament had in view in passing the section would have been merely to prevent damages resulting from animals getting upon the railway and that the plaintiffs in this case could not have recovered. But in construing an Act whose meaning is doubtful it is of course proper to look at the previous state of the law, previous statutes on the same subject, as well as previous decisions upon them. Adopting this course I agree with the learned trial Judge that the only possible inference to be drawn from the

action of Parliament in 1903 in omitting the provisions of sec. 124, sub-sec. 3, of the Act of 1888, which declares that "the company shall be liable for all damages done by its trains and engines, to cattle, horses and other animals not wrongfully on the railway and having got there in consequence of the omission to make complete and maintain such fences and cattle-guards as aforesaid," and in leaving in force merely sec. 289 of the Act of 1888, providing for liability generally for the full amount of the damages caused by the omission on the part of the company to do any act or thing required by the Act to be done by them—is this: that the company is liable for all damages of whatever kind resulting from the omission to fence.

With regard to the contention that there was in any case no obligation to put the fence upon the boundary line, I do not think it can be sustained. Much was said as to the proper interpretation of the word "railway" as used in the sub-sec. 1(a) of sec. 254. What, it is asked, does the expression "on each side of the railway" here mean? My view is that whatever the word "railway" means at that point in the section it ought to mean elsewhere in the section as well. Now sub-section 4, says, "Whenever the railway passes through any locality in which the lands on either side of the railway are not inclosed and either settled or improved, the company shall not be required to erect and maintain such fences, etc." What sense can be made out of this sub-section unless we read the word "railway" as meaning "the right of way" of the railway? It is obviously absurd if we give it any other meaning, and I think the same meaning must be given in sub-section 1(a). It is true that Sedgewick, J., in the case of the *Grand Trunk Railway Company v. James*, 31 S.C.R. 420, 1 Can. Ry. Cas. 422, adopted a different view, but I do not gather from the report that his view on that point formed the *ratio decidendi* of the case, but that the decision turned really upon the Court's view of the then purpose and object of the Act, which, as I have said, must be held to have been altered owing to the amendments which have been made.

The Supreme Court there proceeded entirely upon the theory,

no doubt quite correct as the statute then stood, that the sole object of the legislation was to prevent animals getting upon the track, and it is quite easy to see that Mr. Justice Sedgewick was there much influenced by this consideration in his discussion of the interpretation to be put upon the words "each side of the railway." Here, however, we have to construe those words in an Act whose object, as I hold, is much wider and is not confined to the mere question of animals trespassing upon the railway line. It is of course in one sense a question which point you should take as first decided, that is whether you should first interpret the words "on each side of the railway" and then make your inference as to the object of the Act, or whether having first decided as to the object and general purpose of the Act, you should then proceed to interpret the particular words in question. For myself I think the latter is the proper course, and that having decided that that object and purpose is a much wider one than merely to prevent animals getting upon the track, we are now free to distinguish the case in the Supreme Court as having been decided upon a different statute with a different object, and that we are therefore not in the present case bound to adopt the interpretation put upon the words in question by Sedgewick, J. This being so the result is that the appellants were in my opinion bound in law to erect a boundary fence on each side of their right of way through the plaintiffs' land.

There remains therefore only the question whether the fact that the plaintiff's own fence did not comply with the terms of the Fence Ordinance furnishes any defence to the action. Upon this point also I agree with the result arrived at by the learned trial Judge. In my opinion the Fence Ordinance has no application to a case where it is the duty of the person charged with damage to maintain that portion of the fence through which the animals doing the damage have entered. The evidence here shews clearly that the animals doing the damage entered on the plaintiff's land owing to the non-existence of the boundary fence, and it would be a very strange result if the appellants could take advantage of their own omission to build a portion of the fence

and turn around and say, because on the other three sides the fence was not a lawful fence and although it was not there that the animals entered at all, that therefore, they should be relieved. I do not think that any such absurd result was ever intended by the Ordinance.

I therefore think the appeal should be dismissed with costs.

Short, Cross & Biggar, solicitors for appellants.

Griesbach & O'Connor, solicitors for respondents.

ONTARIO.]

[DOUGLAS, Co. J.

DOUGLAS V. GRAND TRUNK R.W. CO.

(Unreported.)

Defective fence—Cattle at large—Animal killed by falling from railway bridge—Railway Act, secs. 2, 254, 294, 295, 306, 427—16 Vict. ch. 37, sec. 2.

A heifer, while being fed in the stable of an hotel adjacent to the defendants' railway, escaped into the yard of the hotel and from thence on to the defendants' railway through a defective fence. The animal was pursued along the track by the man who had her in charge, till she came to a bridge, and falling through, fell a distance of about 30 feet to the ground beneath and was so severely injured that she had to be killed.

Held, that the defendants were not liable under the Railway Act, sec. 427 (2), the animal not having been killed by the defendants' train. *Young v. Erie & Huron R.W. Co.*, 27 O.R. 530, followed.

THE action was tried at Cayuga on the 10th day of December, 1907, by Douglas, Co. J., for the County of Haldimand and a jury.

The facts of the case are fully set out in the judgment of the learned County Judge.

W. E. Foster, for the Grand Trunk R.W. Co.

H. Arrell, for the plaintiff, Douglas.

W. E. Foster. Under the Railway Act, 1888, section 194 pro-

vided that the railway company should be liable for all damage done by its trains and engines to cattle, etc.

This section was amended by 53 Vict. ch. 28, sec. 2, to read all damage in respect of it caused by any of the company's trains or engines.

This clause was omitted from the fencing clause (199) of the Act of 1903, but section 237, sub-section 4, of that Act was substituted to cover animals at large under section 237 or through want of fencing (section 199). In the present Act (ch. 37, R.S.C. 1906), sections 254 and 294 are substantially the same, and the railway company is only responsible for cattle or other animals killed or injured by a train. These sections should be read together and see section 295.

By section 2, sub-section 32, "train" includes any engine, locomotive or other rolling stock.

There is no common law duty on the defendants to fence. *James v. Grand Trunk R.W. Co.*, 31 O.R. 672, 1 O.L.R. 127, 1 Can. Ry. Cas. 407, 409; *Grand Trunk R.W. Co. v. James*, 31 S.C.R. 420, at p. 431, 1 Can. Ry. Cas. 422; *Daniels v. Grand Trunk R.W. Co.*, 11 A.R. 471, at p. 473; *Conway v. Canadian Pacific R.W. Co.*, 12 A.R. 708. See *Gorris et al. v. Scott*, 9 Ex. 125, at p. 130, *per* Piggott, B., admit there has been a breach of duty; admit there has been a consequent injury; still the legislature was not legislating to protect against such an injury, but for an altogether different purpose. Greater responsibility has been placed upon railway companies since the Railway Act of 1903 was passed, but only in respect of making them liable when cattle get at large upon the property of the railway company through failure to provide a cattle-guard, which will prevent them getting there. Section 427 has no application, and if the liability, if any, is not covered by the sections of the Railway Act referred to, the Special Act (16 Vict. ch. 37, sec. 2) of the Grand Trunk Railway Company will impose it.

The primary object of the fencing section is to protect the travelling public using the railway; to make the railway company liable to an adjoining owner for any cattle killed or injured

by a train or engine through the neglect to fence and properly maintain fences. *Young v. Erie & Huron R.W. Co.*, 27 O.R. 530; *Grand Trunk R.W. Co. v. James*, 31 S.C.R. 420, 1 Can. Ry. Cas. 422; *McKellar v. Canadian Pacific R.W. Co.*, 14 Man. R. 614, 3 Can. Ry. Cas. 322.

If Parliament intended to make the railway company liable for all damage from such neglect, it would have declared that in so many words. The damages sought are too remote and there was contributory negligence on the part of the plaintiff's servant. *Dyer Davis v. Inhabitants of Dudley*, 4 Allen (Mass.) 577; *Clarke v. Bradlaugh*, 8 Q.B.D. 63, at p. 69, was also cited in support of his argument.

H. Arrell. There was no evidence of contributory negligence on the part of the plaintiff or his servants or agents, and the damages which happened were what would ordinarily happen and follow from the breach of duty complained of. It was a case for the jury to decide. There is no common law liability to fence, but there is a kind of easement by which a person is bound by prescription or contract to keep his fences in repair so as to keep in his own and keep out his neighbour's animals; if his neighbour's animals stray on to his land through want of such repair, he is liable if they receive injury in consequence on his own land. The primary object of the fencing section of the Railway Act is not for the protection of passengers, but for the protection of adjoining owners or persons in occupation of the lands of such owners with their license. *Daniels v. Grand Trunk R.W. Co.*, 11 A.R. 471, at p. 473; *Grand Trunk R.W. Co. v. James*, 31 S.C.R., at p. 431; Underhill on Torts, 1st Can. ed., p. 43.

The Railway Act has been entirely changed so far as the liability of the railway company for cattle-guards and fences is concerned. If this were not so, the provisions still might have been kept together, and sub-section 4 of section 294, would have then applied to adjoining owners. The contention of the defendants could only be upheld by inserting a sub-section in section 254, which is not there. Because in the Act of 1888 and the amendment of 1890 these two sections were read together is no

reason why they should be now so read, but the strongest reason against such a course, or they would not have been separated.

Section 254 applies to adjoining owners, and section 294 applies to animals escaping from the highway on to the property of the railway company.

There is no principle and no rule of construction by which a sub-section dealing entirely with a different object should be read with another section. *Yeates v. Grand Trunk R.W. Co.*, 14 O.L.R. 637, 7 Can. Ry. Cas. 4.

The object of the Railway Act is for the protection of adjoining owners. *Dixon v. Great Western R.W. Co.* (1896), 2 Q.B. 333 (1897), 1 Q.B. 300.

Section 427 applies to this case, (1) because no penalty is provided in the Special Act, and (2) because of sub-section 2 of this section which provides for liability in any case, in addition to any such penalty, for the full amount of damages sustained by reason of the act or omission. The Special Act says that until fences and cattle-guards shall be duly made the company shall be liable for all damages which shall be done by their trains or engines. This is not a penalty, and section 427 therefore applies.

Therefore if we read sections 254 and 427 together and give them their plain meaning, the defendants are clearly liable, and this is the proper construction of the statute.

The only difference between our Act and the Imperial Act as to fencing is that in the Imperial Act it is stated to be for the protection of adjoining owners, and there are cases in our Courts which hold that is the meaning of ours. See also *Toronto R.W. Co. v. Grintead*, 21 A.R. 578, 24 S.C.R. 570.

W. E. Foster, in reply. The Imperial Act differs from ours as to fencing against adjoining owners, in that the former sets forth that company shall fence against owners and occupiers of lands adjoining the railway. English decisions are not altogether, I submit in point, and our authorities should be followed.

There is under the common law in England no duty on the part of a landowner to fence against cattle belonging to others,

and each must take care of his own. *Dovaston v. Payne*, 2 H. Bl. 527; *Pomfret v. Rycroft*, 1 Wm. Saund. 320.

Railway companies when lawfully authorized to operate are not subject to any liability beyond the ordinary common law liability, except where the legislature has thought fit to impose it. *The King v. Pease*, 4 B. & Ad. 30.

The plaintiff, not being an owner or occupier of adjoining lands could not take the benefit of the fencing section under either of the Acts above stated.

Section 4 of the Railway Act makes the Special Act of the defendants' railway, being a work for the general advantage of Canada, applicable, particularly as all Acts governing the same were reaffirmed by 56 Vict. ch. 47, sec. 11.

The remedy provided in the fencing section of the Special Act must govern and that is the only remedy.

The sections in the Railway Act with regard to fencing and animals at large have always been separate and not joined together.

Section 427 does not apply, the words "in any case" apply only to a case where there is penalty. The defendants would not be liable to a penalty, but only to damages as provided in their Special Act and a penalty is only applicable where it affects the public generally.

See also the rule in *Hardeastle on Construction of Statutory Law* (1879 ed., p. 116). "If it appears from the language of an enactment that it is the intention of the Legislature that an action should lie for damages sustained by reason of neglect to perform some duty created by the statute in question, it will still, in order to maintain an action, be necessary to prove that the damage or loss was of such a character as it was the direct object of the statute to prevent.

The damages are too remote and the injury is not one for which the defendants are liable in the contemplation of the Act.

January 14, 1908. DOUGLAS, Co. J.:—This action was brought against the Grand Trunk Railway Company for \$200 damages under the following circumstances.

The plaintiff is a dealer in well-bred cattle and had attended a sale and purchased a pedigreed heifer at Mitchell, Ontario. It was shipped to Caledonia, the station nearest his home and after its arrival he had given directions to his man servant to unload and place it in the stable of an hotel adjoining the defendants' railway. This the servant had done, but while in the act of feeding it the heifer escaped from the stable, but was turned into the yard belonging to the hotel and it was from this yard the heifer escaped through a large hole in the defendants' fence on to the tracks of the defendants' railway, where it ran for a considerable distance followed by the plaintiff's servant. The heifer finally reached a bridge of the defendants and in its attempt to cross over fell down a distance of some thirty feet breaking its back, which necessitated it being killed. It was found in this condition, a short time after its escape. The defendants in their defence pleaded the Railway Act, section 306 and their Special Act, 16 Vict. ch. 37, sec. 2.

The action came on for trial with a jury on the 10th of December, 1907, and at the close of the plaintiff's case, counsel for defendants moved for a nonsuit on the ground that there could be no recovery as the evidence disclosed the heifer had not been killed by the defendants' trains or engines.

It was admitted that the fence had not been maintained by the defendants in accordance with the statute and if the heifer had been killed by the defendants' trains or engines the defendants would have been liable for damages.

I reserved judgment on the motion for nonsuit and left it to the jury to find on the question of damages and the jury found damages against the defendants for \$145.

There does not seem to be any reported cases in our Courts on the exact point involved.

Mr. Arrell, for plaintiff, strongly argued that as the defendants were negligent in maintaining their fence as required by law they were responsible in damages under the provisions of section 427 of the Railway Act.

Other sections of the Railway Act referred to were 2, 254, 294 and 295. Mr. Foster for the defendants contended that section 427 did not apply because the remedy is provided by the Special Act, 16 Vict. ch. 37, sec. 2. At the time that *Young v. Erie & Huron R.W. Co.*, 27 O.R. 530, was decided there was a provision in the Railway Act similar to section 427 of the present Railway Act and I feel that I am bound by the decision of the Chancellor in this case. His Lordship says: "As to damages found by the jury in respect of the trouble incurred in watching cattle on account of the bad state of the fences I do not think these are recoverable as a consequence of the neglect on the part of the company to observe the directions of the statute. The penalty that follows non-observance is given by the statute 53 Vict. ch. 28, sec. 2 (D.), and it is limited to injury caused to animals by the company's trains and engines. There is no common law liability to fence and the obligation being imposed by statute the responsibility is to be measured by the language of the statute." Osler, J., seems to agree with this view in *James v. Grand Trunk R.W. Co.*, 31 O.R. 672, 1 O.L.R. 127, 1 Can. Ry. Cas. 407, 409.

Then has the Railway Act not since that time been so changed as to increase the responsibility of railway companies in this respect? I cannot find such a change in the Railway Act, although no doubt their responsibilities have been made greater by reason of the present provision as to cattle at large and as to cattle-guards at highway crossings. I cannot give effect to the argument of counsel for defendants when he argues that the plaintiff's servant negligently allowed the animal to escape from the hotel stable. Had it not been for his admission that the defendants would have been liable if the heifer had been killed by the defendants' trains or engines I would have submitted the whole of the questions involved to the jury.

I think, therefore, the plaintiff must fail in his action, but I think without costs under the circumstances.

ONTARIO.]

[DIVISIONAL COURT.]

HIGGINS V. THE CANADIAN PACIFIC R.W. CO.

(18 O.L.R. 12.)

Railways—Sheep Escaping to Adjoining Farm and thence upon the Railway Track—Injury Thereto—Opening under Gate at Farm Crossing—Openings also in Fence.

The plaintiff's sheep, without any negligence on his part, escaped from his farm into that of the adjoining owner, through which the defendants' railway ran, and thence having got upon the railway track were killed. There was a gate at a farm crossing on the adjoining owner's farm which had been raised by the defendants at the request of such adjoining owner, leaving an opening under the gate sufficient for the sheep to get through. There were also openings in the fence through which the sheep could have got upon the track; but there was no finding of the jury as to the place at which the sheep got upon the track:—

Held, that the defendants were liable under sec. 294 (4), even assuming that the sheep got upon the track through the opening under the gate.

The effect of the words contained in the section, namely, "at large whether on the highway or not," is that the section is not limited to cattle being at large on the highway and thence getting upon the railway premises.

THIS was an appeal by the defendants to a Divisional Court from the judgment of the county court of the county of Simcoe in favour of the plaintiff in an action tried with a jury.

The facts are fully set forth in the judgment of Riddell, J.

The appeal was heard before FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ., on November 5th, 1908.

Shirley Denison, for the appellant. Section 294 (4) of the Railway Act, R.S.C. 1906, ch. 37, does not apply. The sheep must be at large on some highway or public place, and thence get upon the railway premises. These words were taken from the Pounds and Fencing Acts, the words first appearing in the Pound Act of 1857, and in the construction which has been placed on them, the above meaning was given to them. When used in the Railway Act, they must receive the same construction: *Ives v. Hitchcock* (1830), Drap. Rep. 247; *Fensom v. Canadian Pacific R.W. Co.* (1904), 7 O.L.R. 254; *Yeates v. Grand Trunk R.W. Co.* (1907), 14 O.L.R. 63; Ontario Bureau of Industries Report, 1897, by C. C. James, Adolphustown, pp. 1

to 18; *McSloy v. Smith* (1895), 26 O.R. 598. The plaintiff's rights, if any, depend on sec. 254. There can be no recovery under that section. The evidence shews that the sheep escaped by getting under Craig's gate, which had been raised by the defendants at Craig's request. Craig could not have maintained an action had the sheep been his and they had escaped from his land by this opening; and the plaintiff, as a licensee of Craig, can be in no better position: *Kilmer v. Great Western R.W. Co.* (1874), 39 U.C.R. 595; *Yeates v. Grand Trunk R.W. Co.*, 14 O.L.R. 63; *Clayton v. Great Western R.W. Co.* (1873), 23 C.P. 137. The Court can supplement the finding of the jury on this point: Con. Rule 615; and this would dispose of the case: *Smith v. Canadian Express Co.* (1906), 12 O.L.R. 84. In any event there should be a new trial.

A. E. H. Creswicke, for the respondent. Section 294 (4) has not the effect contended for by the appellants. The words "at large" are not limited to sheep at large on a highway. The additional words contained in the section, "whether on the highway or not," clearly shew this; and therefore the section covers the case of the sheep being at large on Craig's land: *Carruthers v. Canadian Pacific R.W. Co.* (1907), 39 S.C.R. 251. The evidence does not justify a finding that the sheep got through the opening under the gate and not through an opening in the fence. In any event, the Court cannot assume the function of the jury and make a finding on this point. Under sec. 294 (4), the plaintiff is entitled to recover unless negligence on the plaintiff's part is proved. The onus of proving such negligence is on the defendants, and they have failed to prove any such negligence: *Carruthers v. Canadian Pacific R.W. Co.*, 39 S.C.R. 251. The judgment, therefore, was properly entered for the plaintiff.

November 12, 1908. RIDDELL, J.:—The plaintiff had a flock of sheep upon his farm in the township of Medonte. The sheep broke out of the small field in which they were enclosed into the farm of a neighbour, one Craig. Through the land of Craig runs the line of the defendants' railway. By a verbal agreement with Craig the

gate between Craig's field and the railway land was raised 18 inches to 2 feet 5 inches from the ground. I assume in favour of the defendants that it was under this gate that the sheep made their way upon the railway line—the jury were not able to say whether it was so or whether the sheep made their way through defects in the fence. The sheep did make their way upon the line of rail and were killed. There was no “negligence or wilful act or omission of the owner or his agent” proved: sec. 294 (4) of the Railway Act. Upon the findings of the jury, the learned county court Judge at Barrie directed judgment in favour of the plaintiff for the value of the sheep killed as found by the jury. The defendants now appeal.

The statute which, in my view, governs the case is R.S.C. 1906, ch. 37, sec. 294 (4): “When any . . . sheep . . . at large, whether upon the highway or not, get upon the property of the company and are killed . . . by a train, the owner of any such animal so killed . . . shall, except in the cases otherwise provided for by the next following section, be entitled to recover the amount of such loss . . . against the company . . . unless the company establishes that such animal got at large through the negligence or wilful act or omission of the owner, or his agent, or of the custodian of such animal or his agent.” The defendants argue that the sheep in the present instance did not come within the meaning of the words “sheep . . . at large,” and claim that the right, if any, of the plaintiff, must be under sec. 254; that, consequently, his rights are no higher than those of Craig, and Craig could not claim because the defect was due to his own request and agreement.

I am not able to give effect to that contention.

The history of the legislation is with sufficient detail and accuracy stated in MacMurchy & Denison's *Railway Act*, pp. 452 *seq.*, and is discussed in the judgments of the Manitoba Court in *Carruthers v. Canadian Pacific R.W. Co.* (1906), 16 Man. L.R. 323. This Division had occasion to consider the state of the law as it was before the revision of 1906, in *Yeates v. Grand Trunk R.W. Co.*, 14 O.L.R. 63; and the Supreme Court of Canada had the same matter before them in *Canadian Pacific R.W. Co. v. Carruthers*,

39 S.C.R. 251. Any doubt which there might have been, had the Act remained as it was before the revision, can, in my opinion, no longer remain. It is clear that an animal may be at large at places other than upon a highway, and I have no doubt that an animal is "at large," within the meaning of the statute, when it has broken its way into the field of an owner adjoining.

The provisions of the Act are plain enough. A railway company has the power to cross a highway (sec. 254); it must erect and maintain cattle guards on each side of the railway at the crossing and turn the fences in to the cattle guards, the fences and cattleguards being suitable and sufficient to prevent cattle and other animals from getting off the highway upon the railway. All persons are forbidden (sec. 294) to permit cattle, etc., from being at large upon a highway within half a mile of the railway crossing; and if animals are so allowed to be at large and are killed at the intersection, the railway is not liable. But if the railway have neglected the provisions of sec. 254, and either the fences or cattle guards should be wanting or so defective that the animal gets upon the railway from the highway and is killed, the railway must pay for the result of such a disobedience of the statute.

Moreover (sec. 254), the company must erect and maintain upon the railway property along the sides thereof a fence suitable and sufficient to prevent cattle, etc., from getting upon the railway. If any adjoining proprietor desire something different or less he may induce the company to depart from the express provisions of the Act; and if he suffer therefrom, he cannot complain: *Yeates v. Grand Trunk R.W. Co.*, 14 O.L.R. 63; nor can his tenant, or perhaps any one claiming a right in the land by, through or under him. But he cannot deprive other people of their rights; and one of these rights is that their cattle, if they should get at large, shall be kept from the railway property by a railway fence built and maintained according to the Act.

No advantage would arise from a consideration of the cases decided before the Act of 1903; the Courts in the several Provinces of the Dominion did not agree as to the person who was entitled to the advantage and benefit of the fencing clauses.

As the statute stands, if any animal gets upon the railway from an adjoining piece of land, such animal being the property of the owner of the land, his tenant or licensee, the rights of the owner of the animal depend upon sec. 254 (*Yeates v. Grand Trunk R.W. Co.*); if the animals are, without the will of its owner, trespassing upon the piece of land, the case is governed by other considerations; then the railway is liable unless the act of some one for whom they are not responsible has intervened, as set out in sec. 295.

To put the matter in another way—as it seems to me, Parliament has said to the railway company: “We, for your advantage and to the advantage of the public, prohibit the running at large of animals upon the highway near your crossings, and if any animals do get at large and get upon your line at a point at which you can not fence against them, i.e., at the intersection, you will not have to pay for them if they are there killed. But animals will stray; if this straying is the fault of the owner we shall let him bear the loss if his animals are killed upon your line; if, however, he is not to blame, you must pay if you do not keep them off by fence and cattle guards.” And the Courts add: “If any land owner wishes something different from the statutory provisions, you may make a bargain with him, and he will not be allowed to complain, nor will any one claiming by, through and under him.” That, however, is as far as the Courts have gone, and I think in view of the words of the statute that is as far as we can go.

And while we are not technically bound by the decision of the Supreme Court in the *Cunningham* case, the reasoning of that Court—that of the majority of the Manitoba Court of Appeal—is irresistible in the present wording of the Act.

The appeal should be dismissed with costs.

FALCONBRIDGE, C.J., and BRITTON, J., concurred.

ONTARIO.]

[DIVISIONAL COURT.]

MCLEOD V. CANADIAN NORTHERN R.W. CO.

Railway—Fences—Statutory obligation as to—Gap left in fence—Animals—Injury to—When “at large”—Contributory negligence—Proximate cause—Cause of action—Lands—Enclosed and either settled or improved—Onus of proof—Dominion Railway Act, secs. 254, 294, 427.

The plaintiffs had leased a field, on which they pastured their horses, adjoining the track of the defendants' railway, from which it was separated by a fence erected by the defendants, in which they had left a gap, through which the horses strayed on to the track, where they were run down by a train and killed:—

Held, that the horses were not “at large” within the meaning of sec. 294 of the Railway Act, R.S.C. 1906, ch. 37, which was in force at the date of the accident, and which does not cover the case of such owners as the plaintiffs, who were using their pasturing land adjoining the railway track in the usual manner for the purpose of keeping and feeding their cattle, nor could such owners be considered as “suffering” their animals to “enter upon” the railway, and so losing their right of action under sec. 295(e).

- (2) There is no express provision in the present Railway Act equivalent to sec. 16 of the Consolidated Railway Act of 1879, as amended by 46 Vict. ch. 24, sec. 9 (D.), under which it was decided in *Davis v. Canadian Pacific R.W. Co.* (1886), 12 A.R. 724, that the question of contributory negligence did not arise where the proximate cause of the damage was the omission of the railway company to make or maintain fences as required by the statute.
- (3) Notwithstanding the absence of an express provision such as is above referred to, the defendants were liable to the plaintiffs for the damages sustained by them, by reason of the duty imposed upon the defendants by sec. 254 of the Railway Act to “erect and maintain upon the railway” fences “suitable and sufficient to prevent . . . animals from getting on the railway,” for breach of which duty a statutory right of action against the company is given by sub-sec. 2 of sec. 427 of the Act, to any person injured, for the full amount of damage sustained thereby.
- (4) *Prima facie* the fence was erected by the company in accordance with their statutory obligation to do so where the lands through which the railway passes are “enclosed and either settled or improved” (sec. 254, sub-sec. 4); and the onus lay on the defendants to shew that at the time when the fence was erected, it was not “required” by the Act.

New Brunswick R.W. Co. v. Armstrong (1883), 23 N.B.R. 193, approved and followed.

Judgment of Clute, J., affirmed.

THIS was an appeal by the defendants from the judgment of Clute, J., in favour of the plaintiffs, in an action tried with a jury at Bracebridge, on 7th May, 1908, for damages for the killing and injury of horses upon the defendants' railway.

On the findings of the jury a verdict was given for plaintiffs for \$590 and costs, from which the defendants appealed to a Divisional

Court. The appeal was heard by BOYD, C., MAGEE and LATCHFORD, JJ., on 20th November, 1908.

R. B. Henderson, for the defendants. The plaintiffs' land was not inclosed within the meaning of the statute, and there was no liability on the defendants to fence. There is no evidence of how the horses got on to the track, and if they did get there in the manner alleged by the plaintiffs, it was by means of a road which defendants had allowed to remain there for the convenience of the plaintiffs, who cannot now be heard to assert that it should not have been there. The plaintiffs' cattle were "at large" within the meaning of sub-sec. 4 of sec. 294 of the Railway Act, R.S.C. 1906, ch. 37, and the defendants are entitled to set up the defence of contributory negligence, which is clearly established by the evidence. The case of *Davis v. Canadian Pacific R.W. Co.* (1886), 12 A.R. 724, by which the trial Judge held he was bound, was decided under sec. 16 of the old statute, 42 Vict. ch. 9, as amended by 46 Vict. ch. 24 (D.), but there is no equivalent to that section under the present Railway Act. It was first changed by 53 Vict. ch. 28, sec. 2, for which was substituted sec. 237, sub-sec. 4, of the Railway Act of 1903, under which the owner cannot recover damages if negligence is proved against him. A similar provision is made in sec. 294 of the present Act. The decision in *Yeates v. Grand Trunk R.W. Co.* (1907), 14 O.L.R. 63, was *obiter* and not binding on this Court. The defendants' point is that under the present law no change is made from the ordinary law as to contributory negligence in favour of cattle owners.

J. B. Clarke, K.C., for the plaintiffs. The plaintiffs were entitled to pasture their horses in the field leased by them adjoining the defendants' railway, and there was no way in which they could have got to the tracks except through the gap left by defendants in the railway fence. It was the duty of the defendants under the statute to construct and maintain on their railways proper fences, gates, etc., and in case of breach of that duty, a right of action is given against them: R.S.C. 1906, ch. 37, secs. 254, 427. The neglect of this duty was the proximate cause of the accident, there-

fore the question of contributory negligence in turning the horses in question into the pasture field which was not fenced off from the railway does not arise. The following cases were referred to: *Davis v. Canadian Pacific R.W. Co.*, 12 A.R. 724; *Dunsford v. Michigan Central R.W. Co.* (1893), 20 A.R. 577; *McMichael v. Grand Trunk R.W. Co.* (1886), 12 O.R. 547; *Yeates v. Grand Trunk R.W. Co.* (1907), 14 O.L.R. 63. Section 294, sub-sec. 4, relied on by defendants, only applies to a case where animals escape on to a highway and from thence to the railway track: *Lebu v. Grand Trunk R.W. Co.* (1906), 12 O.L.R. 590; *Bacon v. Grand Trunk R.W. Co.* (1906), 12 O.L.R. 196; *Arthur v. Central Ontario R.W. Co.* (1906), 11 O.L.R. 537; see also *Canadian Pacific R.W. Co. v. Carruthers* (1907), 39 S.C.R. 251.

December 18, 1908. BOYD, C.:—Upon the findings of the jury the horses of the plaintiff were killed or injured because the railway company, having fenced along the field occupied by the plaintiff adjoining the track, left an unfenced place or gap in the fence, through which the horses strayed from the pasture field, to and along the track, and while thus on the property of the railway company were run down at night by a train.

This happened on the 26th June, 1907, at a time when the new revised statutes of Canada had come into effect, that date being the 31st January, 1907 [6-7 Edw. VII. ch. 43 (D.)].

The special sections which have to be considered in this appeal are secs. 254 and 294. After the argument there were left two contentions, which are now to be disposed of: First, and the one most strongly urged, that the plaintiff was, on his own shewing, guilty of negligence or contributory negligence in turning his horses into a field when he knew there was an open and unprotected gap in the railway fence; and second, but less strongly, that under the statute the company was exempted from putting up or keeping up a fence in the locality and at the plaintiffs' farm.

Upon the first, the principles laid down in *Davis v. Canadian Pacific R.W. Co.*, 12 A.R. 724, are against the contention, if that decision is applicable to the present statute law. That case was decided in 1886 under 46 Vict. ch. 24, sec. 9, providing for amend-

ment of sec. 16 of the Consolidated Railway Act of 1879, and giving a new sec. 16, of which sub-sec. 2 provides that if the fences required by the Act are not duly made and maintained the company shall be liable for all damages done on the railway by their trains to the cattle, etc., of the occupant of the land in respect of which default has been made in the fencing. It was held, under this state of the law, that the question of contributory negligence did not arise, because the company was made liable for all damages to cattle until the fences should be built which ought to have been built: Patterson, J.A., at p. 733. And Osler, J.A., said, at p. 737: "As at present advised, my opinion is that where the proximate cause of the damage is the omission of the company to make or maintain fences as required by the statute, the question of contributory negligence in turning the animal into a field not fenced off from the railway would not arise. The plaintiff had the right to use the field, and the duty to fence as against him being absolute, I cannot see that he would owe any legal duty to them to keep his animal from the railway track."

But this provision has, after certain amendments in form, substantially disappeared from the new statute, and a different provision has apparently been "substituted" for it. After passing through modifications in 1888, 51 Vict. ch. 29, sec. 194 (3), and in 1890, 53 Vict. ch. 28, sec. 2, it was replaced in the new Railway Act of 1903 (3 Edw. VII. ch. 58) by sec. 237, under the sub-heading "animals at large," sub-sec. 4 of which sec. 237 has a note appended, "Sub. for 53 Vict. ch. 28, sec. 2," meaning, I suppose, substituted for the earlier provision which had been classed under the general head of "fences and cattle guards."

The new sub-section is to the effect that when any cattle, whether at large upon the highway or otherwise, get on the property of the company and are killed by a train, the owner shall recover the amount of the loss against the company, unless the company in the opinion of the jury establishes that the animal got at large through the negligence or wilful act or omission of the owner, but the fact that the animal was not in charge of some competent person shall not for the purposes of the sub-section deprive the owner of his right

to recover. This enactment applies to "animals at large," and it would seem to me not aptly expressed if it is intended to relate to animals grazing or feeding at will in the field of the owner adjoining the track. Treating this appended note as a legislative declaration, though I do not decide that it is so, it appears evident that the substituted section is addressed to the case of "animals at large" as is expressed in the sub-heading of the section. I do not read it as covering the case of animals not at large, but grazing or feeding in the owner's field or premises adjoining the track. The former sec. 53, Vict. ch. 28, sec. 2, was classed under the general head of "fences, gates and cattle guards." There is no equivalent for this section in the new statute of 1903, for the section said to be substituted is of different scope, as I have indicated. In the Act of 1903 the sections grouped under the heading of "fences, gates and cattle guards" impose the obligation upon the railway to erect and maintain fences upon the railway sufficient and suitable to prevent cattle and other animals from getting on the railway, and this applies not only to the cattle of adjoining owners but to all cattle getting on the track through insufficient fences.

At the time of the accident, sec. 294 of R.S.C. 1906, ch. 37, was in force, of which sec. 237 of the Act of 1903 is the foundation. Various amendments are found in the revised version, which do not alter its character as a whole, though the new sub-heading has only the word "animals." The inherent meaning, as shewn by the words "at large" used expressly or by implication, throughout and in each of the sub-sections, restricts it to the case of "animals at large." The case now in hand of cattle on the premises of the owner adjoining the track is not expressly provided for anywhere in the new statute as revised. The negligence of the owner provided for by the section is when his animals get at large or are at large, and do not cover, and are not meant to cover, the case of an owner using his pasturing land and field in the usual manner, for the purpose of feeding and keeping his cattle. In like manner I do not construe that part of the next section, R.S.C. 1906, ch. 37, sec. 295 (e), which takes away the right of action if the owner "suffers" the animal to enter upon the railway, and within the fences, etc., as

applying to this case; for that contemplates the case of a railway having provided proper fences and safeguards, and the owner by his own omission depriving himself of the proper protection thus provided by the company.

The result then arrived at is this. It seems plain that the old provision under which *Davis v. Canadian Pacific R.W. Co.* was decided has been abrogated, and there is, in my opinion, no equivalent express provision to be found, and sec. 294 does not apply to this case. What then? Not the escape of the company from liability, because sec. 254 exists, which provides for the maintenance of fences on each side of the railway, and these to be suitable and sufficient to prevent cattle and other animals from getting on the railway: sub-sec. 3.

At the time of the construction of the railroad in the fall of 1906, the statute then in force was the Act of 1903, sec. 199, but that is the same (with one slight correction) as in the R.S.C. ch. 37, sec. 254. The provision for fencing as to railways, from the very outset of railway legislation, has always been held to be particularly for the benefit of adjoining proprietors.

In one of the first reported cases as to railway fencing, Parke, B., says: "If the cattle had an excuse for being there, as if they had escaped through defect of fences which the company should have kept up, the cattle were not wrong-doers, though they had no right to be there; and their damage is a consequent damage from the wrong of the defendants in letting their fences be incomplete or out of repair, and may be recovered accordingly in an action on the case": *Sharrod v. London and North-Western R.W. Co.* (1848), 4 Ex., at p. 586.

In a later case, *Fawcett v. The York and North Midland R.W. Co.* (1851), 16 Q.B. 611, the horses strayed from the plaintiff's field into a highway, and thence through a gate left open which should have been closed by the company on to the track. The defence was that the horses got out of the field and strayed away through the fault of the owner, and but for that they could not have been on the railway. It was held that the owner had a right to leave his field open upon the highway, that the horses as against

the company were lawfully upon the highway, and it was the obligation of the company to keep the gates closed as against such horses. Commenting on this case, it was put briefly by Jervis, C.J., thus, in *Manchester, etc., R.W. Co. v. Wallis* (1854), 14 C.B., at p. 222: "There, the company was under a "positive obligation to keep the gate closed. What right had they, then, to say the plaintiff's cattle were not lawfully on the highway?" Our Courts have followed these authorities, and citations are useless, except as to the latest case, *Carruthers v. Canadian Pacific R.W. Co.* (1907), 39 S.C.R. 251.

The obligation now on the company is the statutory duty to fence in cases where fencing is required by the statute, and if there is a breach of duty in that respect a statutory right of action is given by sec. 427 of R.S.C. 1906, ch. 37, which provides that in any case of omission to do any act, matter or thing required to be done by the company, the company shall also, and in addition to any penalty, be liable to any person injured by such omission for the full amount of damages sustained thereby: *Le May v. Canadian Pacific R.W. Co.* (1889), 18 O.R. 314, affirmed on appeal 17 A.R. 293, and *Curren v. Grand Trunk R.W. Co.* (1898), 25 A.R. 407.

As to the first point, therefore, I think the principle of the decision in *Davis v. Canadian Pacific R.W. Co.*, 12 A.R. 724, should be applicable to the present situation. It cannot be said that the owner, in allowing his horses to feed on his own land (owned or leased), was equivalent to his suffering them to enter upon the railway premises within the meaning of these words as used in sec. 295 (e). If it is to be so considered, then it was not done, "without the consent of the company," who left the gap in the fence, knowing that the horses in the field might stray through on to the track. The negligence of the owner referred to in the 4th clause of sec. 294 is really applicable to cases where the animal is "at large" and not "at home." I see no evidence of negligence on the part of the owner to be submitted to the jury; no contributory negligence on his part which should involve a nonsuit. The duty of the company to fence (speaking now without reference to sec. 254, sub-sec. 4) was absolute, and as against the company the animals were lawfully in the field.

The defence of negligence does not arise upon the facts; the plaintiff was using the field as owner or occupier lawfully. He had the right to turn out his horses there to feed and stay though he was aware of the gap in the company's fence. *Quoad* the company he was not called upon to keep his horses shut up or under care day and night. No such duty existed on his part to the railway, and no negligence can arise from his acting as any reasonable farmer would act as to his cattle on his own property. But blame rests on the company because they disregarded the obligation to fence imposed by the statute.

Next, as to the fencing question: The evidence in this case shewed that when the railroad was constructed in the fall of 1906 fences were erected in this locality by the company along the track. Some lots on both sides were then fenced, cleared and occupied; how far the fencing extended does not precisely appear, but general evidence was given of farms, and houses, station, store and post office in the neighbourhood, and clearances on the lots. Taking into account the conduct of the railway in putting up the fence in question, it cannot be said there was not evidence to go to the jury to justify their response to the question submitted. It was framed in the terms of the statute thus: "Were the lands through which the railway passed in the locality in question enclosed and either settled or improved?" Answer, "yes." It is true that the charge of the learned trial Judge was not so explicit on the point as it might have been. He did not pointedly call the attention of the jury to the true alternative of the statute that the locality should be either (1) enclosed and improved, or (2) enclosed and settled, and he spoke in one place as if the statute would be satisfied if the place was land improved and settled (61) but later on he reiterates the words of the statute that the lands through which the railway passed in the locality should be enclosed and either settled or improved.

But I do not think this method of direction should involve a new trial, considering the circumstances. The fence on each side of the track before these lots being put up by the railway company leaving the gap as they did for the convenience of persons going

to and from the post office and elsewhere, and being so put up at the time of the construction of the road, it is not to be assumed that this fencing was done without its being "required" by the statute. *Primâ facie* the company was constructing the road in the fall of 1906 with this fencing according to its statutory obligation, and I think the onus rests on the company to shew that the fence so made was a work of supererogation. If the situation was such at the time of erection that fencing at that place was not required by the Act, that was for the company to shew, in view of the evidence given pointing in a contrary direction. This was the ruling in a much similar case by the full Court in New Brunswick: *New Brunswick R.W. Co. v. Armstrong* (1883), 23 N.B.R. 193, which commends itself to my judgment.

The appeal should therefore be dismissed with costs.

I may just note that the expression in sec. 237, sub-sec. 4, of the Act of 1903, "cattle at large upon the highway or otherwise," which in the revision was changed to "cattle at large whether upon the highway or not," does in no way enlarge the scope of the section so as to make it applicable to cattle which are not "at large" in the legal sense. Cattle on the lands of the owner are not "at large," but "at home." The effect of the section as to the words "or otherwise" has been discussed in the Provinces: *Daigle v. Temiscouata R.W. Co.* (1905), 37 N.B.R. 219; also in *Lizotte v. Temiscouata R.W. Co.* (1906), 37 N.B.R. 397; so in Manitoba, *Carruthers v. Canadian Pacific R.W. Co.* (1906), 16 Man. 323, affirmed in Supreme Court, 39 S.C.R. 251.

Again, the words in the other section as to fencing, which in 1903—sec. 199 (3)—were thus expressed, lands "not improved or settled and inclosed," which were clarified in the revision, sec. 254 (4), so as to read "not inclosed and either settled or improved," have been the ground of conflicting decisions: see *Dreger v. Canadian Northern R.W. Co.* (1905), 15 Man. L.R. 386, which was not followed in the next year, 1906, in *Schellenberg v. Canadian Pacific R.W. Co.*, 16 Man. L.R. 154. This last was on the same lines as the holding of Mr. Justice Street in *Phair v. Canadian Northern R.W. Co.* (1905), 6 O.W.R. 140, which was accepted in *Daigle v. Temis-*

couata R.W. Co., *ubi supra*, at p. 220. To this interpretation legislative sanction has now been given by the amendment in the Revised Statute, sec. 254 (4).

MAGEE and LATCHFORD, JJ., concurred.

NOTES.

Right to recover for animals killed or injured on the railway.

This question has always been one of great difficulty and the important changes made in the Railway Acts of 1903 and 1906 have not lessened, but increased, the doubts which former legislation had created. In the Railway Act of 1888, 51 Vict. ch. 29, the substance, if not the exact words of previous statutes, had been reproduced and the earlier numerous decisions were, broadly speaking, applicable and were followed and applied in such cases as *Conway v. Canadian Pacific R.W. Co.*, 12 A.R. 708; *Duncan v. Canadian Pacific R.W. Co.*, 21 O.R. 355; *Nixon v. Grand Trunk R.W. Co.*, 23 O.R. 124, and *James v. Grand Trunk R.W. Co.*, 1 Can. Ry. Cas. 407 and 409, and *Grand Trunk R.W. Co. v. James*, *ibid.* 422.

The law on this subject has been dealt with in Can. Ry. Act (Annotated), pp. 309 *et seq.*, and 452 *et seq.*, and in 1 Can. Ry. Cas. 436, 2 Can. Ry. Cas. 378, 3 Can. Ry. Cas. 249 to 251, and need not be repeated. It will be sufficient to say generally that only the owner of land adjoining the railway or those having permission from him to pasture cattle on his premises could recover for cattle which had got upon the track owing to defective fences and which were killed or injured by the company's trains or engines and that the owners of cattle killed or injured at highway intersections or which escaped thence on to the track over the cattle-guards could only recover where it was shewn that the cattle were properly in charge of some one having sufficient control over them. Section 194 of 51 Vict. ch. 29 is authority for the first proposition and section 271 for the second and each section provided its own right of recovery and duly limited it. By an amendment made in 1890 (53 Vict. ch. 58, sec. 2) the right of owners pasturing cattle on the highway was extended to cases where there was a by-law allowing cattle to run at large, but this by-law, it was held, had no application to private lands, nor were cattle to be considered as "at large" within the meaning of any such by-law where they were trespassing on private lands or even Crown lands: *Rathwell v. Canadian Pacific R.W. Co.*, 25 Can. L.J. 468 (Deacon, Co.J.), and *Fensom v. Canadian Pacific*

R.W. Co., 2 Can. Ry. Cas. 376, 3 Can. Ry. Cas. 231, 4 Can. Ry. Cas. 76, particularly at page 81.

Under the amendment of 1890, however, it was held in the *Fensom Cases*, *supra*, that though not properly "at large" within the meaning of the by-law, because, as between the landowner and owner of the cattle, the municipality could not confer any right over private property, yet by virtue of the express wording of the amendment the fact of cattle trespassing on private lands before they got upon the track and were killed or injured was a defence which the railway company could no longer rely on, because the statute had in terms taken it away, where the municipality had passed a by-law allowing cattle to run at large. It is noticeable that the Judges of the Court of Appeal distinguish throughout in their judgments between cattle which are "at large" upon a public highway and cattle which are trespassing on private property.

The new Act of 1903 swept this amendment away and greatly altered previous legislation. It re-enacted section 194 of the Act of 1888 with certain changes (see section 199), but provided no remedy in favour of the adjoining landowner as the previous enactment had done and his remedy, if any, must have been found either in the general law that breach of a statute confers a right of action upon any one protected by it and injured by its non-observance: *Billings v. Semmens*, 7 O.L.R. 340, 8 O.L.R. 540; *Sault Ste. Pulp Co. v. Meyers*, 33 S.C.R. 23; or else in section 294 of the Act of 1903 giving a general right to recover any damages suffered by a breach of the Act: *Curran v. Grand Trunk R.W. Co.*, 25 A.R. 407 and *Plester v. Grand Trunk R.W. Co.*, 1 Can. Ry. Cas. 27.

Assuming for the moment that section 199 of the Act of 1903, now section 254 of the Act of 1906, derives no assistance from section 237, sub-section 4 of the Act of 1903, now section 294 (4) of 1906 it became a question how far the duty to fence extends and whether it could be said to exist not only for the benefit of the adjoining owner and those having leave from him to pasture cattle on his land or whether it extends to every one so that the owner of cattle trespassing on another's land without license or permission can recover. Unquestionably the Act of 1888 with its amendment of 1890, 53 Vict. ch. 58, sec. 2, only gave a right of recovery to adjoining landowners or to those lawfully claiming as tenants or licensees upon their lands: *Conway v. Canadian Pacific R.W. Co.*, 12 A.R. 708; *James v. Grand Trunk R.W. Co.*, 1 Can. Ry. Cas. 407, 409; *Grand Trunk R.W. Co. v. James*, 1 Can.

Ry. Cas. 422, except as extended by *Fensom v. Canadian Pacific R. W. Co.*, *supra*, but the wording was different then because the Act of 1888, section 194 (3), gave a right of action for "all damages done by it . . . to cattle, horses and other animals not wrongfully on the railway" and on this point the wording was the same in the amendment of 1890. This, as already stated, gave a right of action only to adjoining owners or those lawfully claiming under them and though now by section 427 of the Act of 1906 re-enacting section 294 of the Act of 1903 the railway company "shall also in any case in addition to any such penalty be liable to any person injured by any such act or omission for the full amount of damages sustained thereby"; yet in spite of its very wide terms it will possibly be found that the right of recovery therein contained is vested only in those for whose benefit the various provisions of the Act have been passed and as it was always previously held that the fencing sections of the older Acts were passed for the benefit of adjoining landowners and as the new sections, though omitting the clause providing for recovery have nothing to shew that they are of any wider scope than former sections, it may be that the purview of the present section is no more general than that of the older ones. These questions being, however, largely based upon the assumption that what is now section 294 (4), and was formerly section 237 (4), of the Railway Act of 1903 had no application to the case of cattle which get on to the track either from an adjoining owner's property or which first break out from one person's farm into another and get thence on to the track without passing upon a highway or other public or waste lands, they are probably set at rest by the judgment of Mr. Justice Riddell in the *Higgins Case*, now reported; because that was a case where cattle got first upon an adjoining owner's property and thence on to the track without being upon a public highway or commons at all, and it is now apparent from that judgment that section 294(4) of the Act of 1906 does apply. That being the case it would appear that the defences now open to a railway company when cattle are killed upon the track are either those outlined in section 294, sub-section 4, in which the proof of negligence or some wilful act or omission on the part of the owner now lies upon the railway company or else cases where the railway company can shew that the claim is within one or other of the alternatives provided for by section 295.

The decision in the *Winterburn case*, pp. 1 *et seq.* was not approved by the Manitoba Court of Appeal, see *Hunt v. Grand Trunk Pacific R.W. Co.*, 10 West. L.R. 581, who took the contrary view.

EXPROPRIATION—COSTS.

QUEBEC.]

[SUPERIOR COURT.

CHATEAUGUAY & NORTHERN R.W. CO. v. LAURIER.

(9 Q.P.R. 245.)

Expropriation by a railway company—Ratification of arbitration award—Costs—C. P. 549, 1067 R.S.Q. 5164.

- Held*, 1. A petition for the ratification of an arbitration award, upon an expropriation of land by a railway company for the building of its line, is presented in the interest of the railway company solely, the company shall pay the costs of appearance upon the petition, with the costs of the expropriated owner's attorneys on the petition, but not the costs on a reply to the petition.
2. The costs incurred in the distribution of the monies deposited in Court by the company petitioner shall be taken out of the said monies as in the ordinary course of law.

March 28, 1906. DE LORIMIER, J.:—The Court having heard the parties by their counsel, on the merits of the petition for ratification of the award in this matter, having examined the documents and proceedings of record, and thereon duly deliberated, doth adjudge as follows:—

By arbitration award, rendered by a deed drawn before Elie Lemire, notary, on the 24th of October, 1905, and registered on the 10th of November, 1906, the arbitrators appointed according to law to expropriate part of cadastral lot No. 292 of the parish of L'Epiphanie, for the purposes of the company petitioner, to wit, for the construction of its line of railway, have expropriated the parcel of land described as follows: (here follows the description). The parcel of land so expropriated had been in the possession of the said Charles Laurier, farmer of L'Epiphanie, during the preceding three years and for some time prior to that.

It appears from the said arbitration award that the capital amount of the indemnity was fixed at \$74. The land in question is charged with a substitution and several hypothecary

Translation by R. Paradis, advocate, Montreal, P.Q.

obligations. The company petitioner has, pursuant to sec. 5164 of the Revised Statutes of the Province of Quebec, presented a petition praying for ratification of the said arbitration award, after having made deposit of the sum of \$791.18 in the office of the prothonotary of this Court to cover the amount of the above mentioned indemnity with the interest thereon, and given notice of the said petition required by law.

The expropriated party appeared by counsel and filed a document entitled "Reply to the petition for Ratification of Title," by which the said expropriated party declares that he is not opposed to the ratification as prayed for, but argues that the petitioner should be held responsible for all costs incurred.

By the wording of sec. 5164, par. 33, of the Revised Statutes of the Province of Quebec, cited above, these costs are left at the discretion of the Court.

The petition for ratification of title is in order on account of the expropriation made by the petitioner for the construction of its railway line, and it is in the interest of the petitioner to obtain a clear title to the lot of land expropriated. It is therefore just that the company petitioner should pay the costs of its petition for ratification—save those incurred in the distribution of the monies, which are hereinafter provided for, as well as the costs of the expropriated party's counsel upon the petition itself. The expropriated party shall, however, bear the costs of his counsel upon everything else, inasmuch as there was no necessity of filing a reply merely in order to pray for costs against the petitioner. As to the costs incurred in the distribution of the monies deposited in Court, they shall come out of the monies themselves. It would not be fair to lay them upon the company petitioner, which, in the impossibility of paying for and clearing the land expropriated on account of hypothecs and real rights affecting it, has already borne the costs of proceedings in ratification, as herein-above awarded. Therefore judicial notice is taken of the petitioner's deposit in Court of monies due in this case, said monies to be distributed to the proper creditors thereof.

The Court ratifies the said arbitration award; frees the lot of land expropriated by the said award from all charges, hypothecs, substitutions and incumbrances whatsoever; orders the petitioner to pay the costs of all proceedings in ratification, including the fees of the expropriated party's attorney, but only on their appearance on the petition, and costs of the registration of the judgment if said registration is made by the petitioner; orders the prothonotary of this Court to proceed to the distribution of the monies deposited in Court, the costs of the said distribution to be levied out of the monies themselves—the whole as required by law.

J. E. Faribault, K.C., attorney for petitioner.

Tellier & Ladouceur, attorneys for expropriated party.

QUEBEC.]

[SUPERIOR COURT.]

CANADIAN NORTHERN R.W. CO. V. TOUCHETTE & FORTIER.

(9 Q.P.R. 125.)

Expropriation—Appointment of a clerk to the arbitrators—Appeal from the award—Petition by the clerk for payment of his fees out of the deposit made in bank for the immediate taking possession of the land pending expropriation proceedings—Railway Act, secs. 152, 162, 171.

- Held*, 1. The award by the arbitrators does not constitute a judgment for costs and, therefore, the latter cannot be recovered against the losing party by way of execution.
2. By section 162 of the Railway Act, the Judge in taxing the costs is exercising a function merely ministerial, and such taxation has not the effect of giving to the party in favour of whom the costs have thus been taxed, a judgment upon which he might proceed to recover his costs.
3. The only means to recover the costs under the Railway Act, would be by way of an ordinary action, *i.e.*, compare *Ex parte Gagnon*, Q.R. 3, S.C. 288.

A petition was presented by Joseph Fortier who had been appointed a clerk for the board of arbitrators in a case in expropriation by the Canadian Northern Quebec R.W. Co. against Dame Delia Touchette.

The company had obtained possession of the land pending expropriation proceedings under section 171 of the Railway Act, and had given security by depositing a certain amount in a chartered bank. The arbitrators awarded a larger amount to the expropriated party than the company had offered and the costs of the arbitrators had, therefore, to be borne by the company. But the company took a direct action to have the award set aside on grounds of illegality. The clerk as a test case for himself and the arbitrators, as well as others interested, made a petition whereby he prayed that the Court issue an order enjoining upon the bank in which the money was deposited, to pay to him the amount of his taxed costs out of the deposit made in the bank, under reserve for the company of all its right of action, recourse or appeal against the award of the arbitrators.

December 17, 1907. *Joseph Fortier*, for himself.

Thibadeau Rinfret, for the company, cited *Ontario & Quebec R.W. Co. v. Philbrick*, 5 O.R. 674, 12 S.C.R. 288; *Foster v. Great Western R.W. Co.*, 32 U.C.R. 503.

December 31, 1907. ROBIDOUX, J.:—Whereas petitioner Joseph Fortier alleges by said petition that by virtue of an *ordonnance* of this Court, the Canadian Northern Quebec R.W. Co., has deposited in the Merchant's Bank of Canada, in the town of St. Jerome, a sum of \$1,250 to cover the probable compensation and costs of the arbitration under section 171 of the Railway Act, and the arbitrators appointed to ascertain such compensation, have on July 21st, 1907, appointed the said Joseph Fortier as their clerk, that the arbitrators by their award made on October 16th, 1907, the said company has been condemned to pay to the expropriated party a sum of \$911.40 as being the true compensation for the land taken and all damages resulting from the passage of the railway; that on November 23rd, 1907, the fees and costs of Joseph Fortier as clerk of the board of arbitrators were taxed by the Judge to the sum of \$224.80. Whereas by his petition the said Joseph Fortier seeks

to get an order from this Court ordering the Merchants Bank of Canada at St. Jerome to pay to him the said sum of \$224.80 under reserve in favour of the said company of all its rights of setting aside the award, and of being reimbursed of the said sum if the decision of the arbitrators be subsequently annulled. Considering that it appears that the costs of the said Joseph Fortier, as clerk of the board of arbitrators, had been taxed by the Court to the amount of \$224.80.

Considering that the Court in taxing said bill of costs has done an act merely ministerial; has not rendered and could not render in favour of the petitioner a judgment upon which the latter could now proceed by means of an execution to recover the said costs;

Considering that by section 152 of the Railway Act, which gives the Judge the right to tax costs incurred in expropriation proceedings made under this Act, it is merely stated that if the compensation awarded to the expropriated party does not exceed the sum offered by the company, the latter will have the right to deduct from the compensation the costs incurred by said company on account of the expropriation;

Considering that the said Railway Act does not give to the creditor of costs due to him in the course of expropriation proceedings any exceptional recourse of the kind now exercised by the petitioner and that the latter to obtain payment has no other means than the ordinary civil action;

Considering, therefore, that the Court under the circumstances, cannot order the payment of the costs out of the deposit made in the bank by the company:—

Doth dismiss the said petition.

Joseph Fortier, petitioner.

Provost, Rinfret & Marchand, attorneys for the company.

**EXPROPRIATION—COMPENSATION—PERSONS
INTERESTED.**

ONTARIO.]

[COURT OF APPEAL.

CANADIAN PACIFIC R.W. CO. V. BROWN MILLING & ELEVATOR CO.

(18 O.L.R. 85.)

Railways—Expropriation—Renewable Lease—Occupation After Expiration of Term Without Renewal—Tenancy at Will—Compensation—"Persons Interested" in the Land—Right to Renew for Part—Railway Act—R.S.C. 1906, ch. 37, sec. 155.

Lessees under a renewable lease, or their assignees, where the lessors have an option to renew or to pay for improvements, who remain in possession after expiration of the term, but to whom no renewal lease is granted, although demanded, are in occupation as tenants at will merely, and are not "persons interested" in the land within the meaning of sec. 155 of the Railway Act, R.S.C. 1906, ch. 37, and therefore are not entitled to compensation for expropriation of any part of the lands demised. Judgment of RIDDELL, J., reversed.

THIS was an appeal from the judgment of Riddell, J., in this action, which was tried before him, at the non-jury sittings at Toronto, on April 1st, 1908.

The facts are fully set out in the judgment appealed from.

E. D. Armour, K.C., and *Angus MacMurchy*, K.C., for the plaintiffs.

E. E. A. DuVernet, K.C., and *A. A. Miller*, for the defendants.

April 4, 1908. RIDDELL, J.:—The facts are as follows:—

1881. October 1st.—The city of Toronto leased to the Toronto Grape Sugar Co., their successors and assigns, part of water lots 6 and 7, lying on the south side of the Esplanade, for a term of 21 years from July 1st, 1881. In the lease was a covenant by the lessors thus: "That if at the expiration of the term hereby granted or of any future term of 21 years, the said lessees, their successors or assigns, shall be desirous of taking a new lease of the premises hereby granted for a further term of 21 years, having conformed to all the terms and conditions herein mentioned and set forth, and having given to the council of the said corporation thirty days' notice, in writing, of such desire, the said lessors will, at

the costs and charges of the said lessees, their successors or assigns, as aforesaid, grant such new lease for the further term of 21 years from the determination of the present or existing lease, at such rental per foot per annum as the said premises shall then be worth, irrespective of any improvements made by the said lessees, their successors or assigns, such value to be determined" by arbitration. "Provided that if the said lessors do not see fit to renew this or any future lease, the said lessees, their successors or assigns, shall receive from the said lessors such reasonable sum as the buildings and permanent improvements made and erected by the said lessees shall then be worth, such value to be determined" by arbitration.

1889. February 5th.—The Sugar Co. and G. Gooderham, for an expressed consideration of \$10,000, and with the consent of the city, "demised and leased" to the Canadian Pacific Railway Company* a strip of 28 ft. in breadth of the northernmost part of this lot, with a rental, payable annually, of \$500, the term being for one year from the 5th February, 1889, and thereafter, until the expiration of a notice by the lessors provided for in the lease.

1902. January 31st.—The Sugar Co. and G. Gooderham did "grant, bargain, sell, assign, transfer and set over" unto the C.P.R. "all their estate, right, title and interest in" this strip of 28 ft. It is said that this was assented to by the city, but the formal assent has not been produced.

1902. February 10th.—G. Gooderham assigned to Alexander Brown the remaining land—*i.e.*, the land south of the 28-ft. strip—and the buildings thereon. This is assented to by the city.

1902. May 17th.—Alex. Brown assigned this to the defendants, the Brown Co., subject to a mortgage, which the company assumed.

1902. May 22nd.—The Brown Co. and Alex. Brown served written notice upon the council, setting out that Alex. Brown, the present owner of the lease of October 1st, 1881, of the land mentioned,

* Hereinafter in this report this company is, for the sake of brevity referred to as the "C.P.R."

"from which premises have been expropriated a strip of 28 ft. wide from the north side of the property by the C.P.R.," had transferred his interest to the company, and that Alex. Brown and the company desired "a further lease of the said premises for the term of 21 years from the 1st July, 1902," to be granted to the company "in pursuance of the provisions in that regard contained in the original lease."

1902. June 26th.—The city, having received a notice from the C.P.R. for a renewal of lease, served a formal refusal, saying "the said corporation do not see fit to renew the lease of the said lands and premises described in the said notice."

1902. June 30th.—The C.P.R., requiring a strip south of the 28-ft. strip, served a notice on the city, the Brown Co. and G. Gooderham of an application to be made, July 15th, to the Minister of Railways and Canals, for authority to take such additional strip, 24 ft. 6 in. in width, under the Railway Act, secs. 106-111. An order was made by the Acting Minister on August 29th, 1903, and this was registered September 21st, 1903.

1905. September 22nd.—Notice was served by the C.P.R. upon the Brown Co. that this 24 ft. 6 in. strip was to be taken, and tendering \$1,000 for compensation for the interest of the Brown Co. in this strip. This notice was accompanied by the proper surveyor's certificate.

1905. October 2nd.—Notice was served by the Brown Co. refusing the offer.

No renewal having been made by the city to the Brown Co., but the company remaining in possession of the land, an indenture was afterwards, and on

1906. January 30th executed, whereby the city, after a recital that the C.P.R. had acquired the northerly 52 ft. 6 in. (28 ft. + 24 ft. 6 in.), demised and leased to the Brown Co. the remainder of the land comprised in the original demise for a period of 21 years beginning July 1st, 1902, at a rental of \$798 per annum, in equal half-yearly instalments, except the first, which was \$199.50 for three months to become due and be paid October 1st, 1902. In the meantime no rent had in fact been paid by the

Brown Co. to the city, and no rent has ever been paid upon the 24 ft. 6 in. strip since July, 1902.

A considerable amount of correspondence took place between the C.P.R. and the Brown Co. with a view to settle the amount to be paid to the company, but the negotiations failed, and finally

1906. March 9th—an order was made by the Chief Justice of the Common Pleas appointing three gentlemen arbitrators to determine the compensation to be paid to the Brown Co. In the meantime and in

1905. August 11th—the C.P.R. served the city with notice of expropriation for both strips, and negotiations were subsequently had whereby the land was agreed to be conveyed to the C.P.R. I do not think the dates are material, but I have made a memo. of them, which I attach.

The transactions between the C.P.R. and the city are as follow:—

1905. August 11th.—Notice of expropriation covering both strips, 52 ft. 6 in. in all.

1906. March.—Mr. Forman, Assistant Commissioner, was instructed to make a valuation of the city's interest in this and other lands. Negotiations took place between Mr. Forman and the C.P.R., and the value agreed upon.

1908. February 26th.—Mr. Forman reported to the Board of Control. This was referred to the city solicitor on the 27th February, and he

1908. March 4th—reported as to the course to pursue.

1908. March 10th.—The conveyance was settled by council for the city.

1905. October 9th.—An order was made for possession of the 24 ft. 6 in. strip, whereupon the C.P.R. took possession.

A question of law being raised upon this arbitration as to the right of the Brown Co. to receive anything at all, the matter was, under the Arbitration Act, brought before Mr. Justice Clute, and, at his suggestion, an action was brought to determine the rights of the parties.

No objection was taken, at the trial before me, at the Toronto non-jury sittings, to the jurisdiction of the Court, and both parties desire an adjudication upon the matter.

It is now admitted, and, indeed, the common case, that the rights are to be determined as of September 21st, 1903, as provided by statute, 51 Vict. ch. 29, sec. 145 (D), and now by R.S.C. 1906, ch. 37, sec. 192 (2).

Independently, then, of the date of the "notice to treat," it will be necessary to consider the rights on that day of the defendants the Brown Co., and incidentally of the defendants the city of Toronto.

On September 21st, 1903, the term granted by the lease of 1881 had expired, and had not been renewed. The C.P.R., assignees of the lease so far as the north 28 ft. are concerned, had, after notice to the city of their desire for renewal (May 27th, 1902), been notified by the city (June 26th, 1902) that they would receive no renewal. They had not served, and did not for three years thereafter serve, notice upon the city of expropriation of the 28 ft. strip or of the 24 ft. 6 in. strip. The Brown Co. was in possession of the latter strip. They had (May 22nd, 1902) served notice of desire for renewal, but had received no answer. They were paying no rent, but the city was not interfering with the possession. They had no right of renewal, for the double reason that they were not the assignees of the lease of all the land, and, in any case, the city had an absolute discretion to renew or otherwise. (I have been using the words "renew" and "renewal;" it will be seen that the provision is for "a new lease," "such new lease" to be "for the further term of 21 years from the expiration of the present or existing lease.")

The covenant, such as it is, is to grant the new lease to the "lessees, their successors or assigns." The Brown Co. were not assignees of the lease of all the premises—they could not call for a new lease of all the premises—and it must be clear that the lessors could not be called upon to grant a new lease of part: 18 Am. & Eng. Ency. Law, 2nd ed., p. 691 (c). "Where the lessee has an option to renew the lease, he must, unless the lease ex-

pressly otherwise provides, take a lease of the demised premises as an entirety; he cannot demand a renewal with respect to a part of the premises demised in the original lease:" *Barge v. Schiek* (1894), 57 Minn. 155. In *Cook v. Jones* (1894), 96 Ky. 283, it was held, in the particular facts of the case, that all the assignees jointly might compel the lessor to grant a renewal to them, but it was not held or suggested that any one assignee might or could do so.

I have not found any case in the English Courts or our own in which any such claim has been made—perhaps it has been thought too clear for dispute.

A point not dissimilar is dealt with in the case of *Finch v. Underwood* (1876), 2 Ch. D. 310, where it is held that a covenant to renew, being made to two, one cannot insist upon it in favour of himself alone. "But, under the covenant to renew, the tenant can only ask for such a lease as the landlord covenanted to grant, namely, a lease to both tenants:" *per* Mellish, L.J., at p. 316.

I adopt the language of the Lord Justice, and change the last three words into "of the premises."

And, in any case, the city retained an absolute discretion in the matter, and it cannot be considered that the Brown Co. had any legal right to renewal. They had possession, however, and that was something; the C.P.R. could not eject them; they could give up possession to the C.P.R.; they would sustain damage by reason of the exercise of the powers of expropriation.

The statute provides, 51 Vict. (1888) ch. 29, sec. 92 (R.S.C. 1906, ch. 37, sec. 155): "The company . . . shall make full compensation . . . to all parties interested for all damage by them sustained by reason of the exercise" by the company of the powers granted by the general or special Act. The language of the Imperial Act, 8 & 9 Vict. ch. 20, sec. 6 (the Railways Clauses Consolidation Act, 1845), is a little different: "The company shall make to the owners and occupiers of and all parties interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage

sustained by such owners, occupiers and other parties by reason of the exercise . . . of the powers" given by statute. The Lands Clauses Consolidation Act, 1845, passed the same year (8 & 9 Vict. ch. 18), provides for notice "to all the parties interested in such lands." Our statute does not say in so many words "interested in the lands," but that is implied from the proceedings prescribed for determining the compensation: R.S.C. 1906, ch. 37, sec. 193 (a) (b), and sections following.

The authority of the English decisions under the two Acts of 1845 should, therefore, be recognized, but I cannot find that possession in itself is not considered an "interest in land." There are cases, indeed, such as *Frank Warr & Co. v. London County Council*, [1904] 1 K.B. 713, in which it is held that the exclusive right to perform certain acts upon the property cannot be considered an interest in land; but that is markedly different from possession. See also *Edwardes v. Barrington* (1902), 85 L.T. 650, in Dom. Proc.

The point seems to be conclusively settled by the Privy Council in *Perry v. Clissold*, [1907] A.C. 73. There the New South Wales statute of 1880, 44 Vict. ch. 16, provided for the "valuation of the land or of the estate or interest of the claimant therein to be made." Clissold had in 1881 entered into possession of certain land, fenced it, and held exclusive possession of it. The true owner of the land, out of possession, was and continued to be unknown. The officer charged with the valuation of the compensation refused to entertain Clissold's claim; in this he was supported by the Supreme Court of New South Wales, but this judgment was reversed by the High Court of Australia. Upon appeal, the Privy Council agreed with the High Court. It is quite true that the Privy Council spoke of Clissold as "a person in possession of land in the assumed character of owner, and exercising peaceably the ordinary rights of ownership;" but it is plain that the decision does not depend upon the consideration that he was assuming to act as owner, but upon the fact that he was not a mere trespasser. And in the present case, at the time at which the notice of expropriation was given and at the time as of which the compensation is to be computed,

the Brown Co. were in possession in the character of tenants, and exercising peaceably the ordinary rights of tenants.

What was the value of the interest?

I assent to the proposition that no compensation can be awarded to anyone who cannot give up or grant anything to the railway company which the railway company cannot obtain despite him. Here the Brown Co. had at least their possession to give up, which possession the railway company could not compel the Brown Co. to deliver. Having, then, this, I think it is not alone the legally enforceable rights which the Brown Co. had, but also the benefits which might naturally or probably ensue from the ownership of such rights, which must be considered.

In *In re Cavanagh and the Canada Atlantic R.W. Co.* (1907), 14 O.L.R. 523, I considered, after a review of certain of the cases, that a hotel-keeper had a right, upon a railway expropriation arbitration, to have taken into consideration the loss of his bar business, though that depended upon the ownership of a license, and he had no legal right to the renewal of his license. I have again gone into the authorities, and remain of the opinion expressed in the *Cavanagh* case. The application of such decisions as that in *Lynch v. Glasgow Corporation* (1904), 5 F. 1174, must be governed by the words of the statutes to be considered: *e.g.*, in the *Lynch* case the statute was (Imp.) 8 & 9 Vict. ch. 19, and that, by sec. 17, provided for determining the value of the interest of the persons concerned; and it decided that the chance or hope of obtaining the renewal of a lease after its expiry is not "an interest in the lands" within the statute.

Our Act, as I have already pointed out, provides for payment of compensation to all persons interested for all damage sustained by them, and the wording is more like that of the Hungerford Market Company statute, 11 Geo. IV. ch. 70, referred to in *Ex parte Farlow* (1831), 2 B. & Ad. 341, and other cases.

I think that no compensation can be claimed by anyone who has not an interest in the land, but that, if one has an interest in the lands, he has a right to compensation for damage which he may suffer, and, in estimating such damages, not alone his

strict legal or equitable rights are to be considered, but also the probability of future advantage—of which future advantage he is deprived by the railway company.

In the present case the Brown Co. were in possession by reason of their having been the assignees of part of the leasehold property held under the lease from the city. They were entitled to claim the probability of their being granted a new lease of the strip in question. That is no more an excursion into the realm of conjecture than juries are making every day in estimating damages under Lord Campbell's Act. No one knows how long the widow will live or live unmarried, and so no one knows the actual amount of damages she will suffer—and, therefore, has in law suffered—but a jury is allowed and directed to consider the probabilities.

The amount of compensation could not be permitted in any case to exceed the value of the fee simple of the land: *Penny v. Penny* (1867), L.R. 5 Eq. 227; and so, in an arbitration concerning this land, an amount would be taken off the sum which otherwise would have been awarded to the owner equivalent to the amount which is awarded to the occupant based upon the market value he has in the land. If the city should eject the occupant before the time at which the compensation is to be fixed, of course he will have no right to compensation. Again, if, as in *Syers v. Metropolitan Board of Works* (1877), 36 L.T. 277, the railway company, instead of filing their plan and serving notice of arbitration, buy out the landlord and give notice to quit, they are not deprived of their common law rights as "assignees of the freehold," owners of the freehold by the fact that they are also a railway company.

It is argued that the fact that the railway company has obtained from the city an agreement for the land in question—the deed is not yet executed, but it is claimed that the railway company are in equity the owners of the land—ousts the Brown Co. of all right to compensation. I cannot follow that argument: nothing which took place after the crucial day—September 21st, 1903—between the two parties can affect the rights of the third. The probability or possibility of such a transaction coming about

is a circumstance to be taken into consideration in determining and diminishing the damage, which is to be fixed as of September 21st, 1903, no doubt; but that is the full extent of its significance. And, in any case, there was the possession. The quantum of damages may be a matter of some difficulty, but that may be left to the arbitrators. The granting of the lease by the city to the Brown Co. will not, in itself, be permitted to increase the damages. The burden upon the railway company must not be increased by any act of the owner after the filing of the plan. That day should probably, in our law, replace the day of service of the notice to treat referred to so often in the English cases: *Zick v. London United Tramways* (1908), 24 Times L.R. 240, at p. 242, and cases there cited; *Mercer v. Liverpool St. Helens and South Lancashire R.W. Co.*, [1904] A.C. 461. I do not think, however, that the fact is wholly without significance in the consideration of the probability of a lease having been granted of the strip had the railway not filed their plan and expropriated.

And the acquisition by the railway company of the equitable right to the strip in question will be of assistance in determining the damage from the Brown Co. giving up possession. They had possession until October 9th, 1905, so suffered nothing for that time; then possession was taken from them by reason of the exercise by the railway company of the powers given by the statutes; from that day up to the day upon which the railway company obtained the right as owners of the land to eject them had they remained in possession.

The amount of damage seems to me to be small indeed; but all that is for the arbitrators.

Now, as to the relief specifically asked for.

(a) The plaintiffs claim that the defendants the Brown Co. have had no interest in the strip since the expiration of the lease, June 30, 1902. This claim is negatived.

(b) They claim that the arbitrators had no jurisdiction to arbitrate with respect to the Brown Co.'s interest (if any), inasmuch as they are not persons interested in the lands and seek

an injunction. This claim is negated, and the injunction refused.

(c) They claim that the compensation (if any) should be ascertained with reference to the state of the land at the time of the service of the notice of expropriation, and not at the time of the deposit of the plans, and pray for a declaration accordingly. This claim is negated and prayer refused.

The defendants say that

(d) They had a legal right to a further lease of the remainder of the lands, and as such and also as being in possession of the lands they are persons interested, and so entitled to compensation.

They will be declared persons interested, and so entitled to compensation from being in possession; but they will not be declared to be entitled to a further lease of the remainder of the land.

(e) They make a further claim not of importance, in view of the fact that the city and the railway company have agreed.

(f) They claim a declaration that the compensation shall be ascertained with reference to the state of the land at the time of the deposit of the plan, etc. This follows from what has been said.

(g) They claim their costs of the action.

They have substantially succeeded, but they set up a legal right to a further lease, in which they have failed. I think they should be allowed three-fourths of their costs of action, with a set-off of one-fourth of the plaintiffs' costs.

I have gone more fully into the matter of quantum of damages than was necessary to determine the questions raised by the pleadings. The different views were urged before me by counsel, and it was apparently desired that I should express an opinion.

The plaintiffs appealed to the Court of Appeal, and the appeal was argued on November 30th, 1908, before Moss, C.J.O., and OSLER, GARROW and MACLAREN, JJ.A.

E. D. Armour, K.C., for the plaintiffs (appellants), contended

that the defendants had lost nothing for which they were entitled to compensation, because they had nothing to lose; that they had no interest whatever in the land which was taken: *Stebbing v. The Metropolitan Board of Works* (1870), L.R. 6 Q.B. 37; *Perry v. Clissold*, [1907] A.C. 73; *Gedye v. Commissioners of Her Majesty's Works and Public Buildings* (1891), 2 Ch. 630; Stroud's Judicial Dictionary, vol. 2, p. 997.

E. E. A. DuVernet, K.C., and *A. A. Miller*, for the defendants (respondents), contended that the defendants had an interest in the property in question and were in possession; that this possession had been taken from them, and they had a right to arbitrate to recover proper damages: *Perry v. Clissold*, [1907] A.C. 73; *In re Cavanagh and The Canada Atlantic R.W. Co.* (1907), 14 O.L.R. 523; *McGoldrick v. The King* (1902), 8 Ex. C.R. 169; that mere possession constitutes a legal interest: Pollock and Wright on Possession at the Common Law, pp. 22, 93; *Doed. Hughes v. Dyeball* (1829), Moo. & Mal. 346; that a right of renewal or even a reasonable expectation of renewal is such an interest as entitles to compensation under our Railway Act, R.S.C. 1906, ch. 37, secs. 155, 198; Woodfall's Landlord and Tenant, 18th ed., p. 434; *Plimmer v. Mayor of Wellington* (1884), 9 App. Cas. 699; Am. & Eng. Ency. of Law, 2nd ed., vol. 18, p. 688; that the grant by George Gooderham of February 5th, 1889, was not really voluntary, but was the result of expropriation proceedings, and the exercise of rights of expropriation as to part of the land should not destroy the right of renewal as to the remainder: *Manchester, Sheffield and Lincolnshire R.W. Co. v. Anderson*, [1898] 2 Ch. 394, at p. 403; that, as between lessor and lessee, the term should be implied that expropriation of a small strip of the demised land shall not destroy the lessee's right to a renewal in respect to the remainder; *Lamb v. Evans*, [1893] 1 Ch. 218, at p. 229; *Ex parte Ford, In re Chappell* (1885), 16 Q.B.D. 305, at p. 307; *Baily v. De Crespigny* (1869), L.R. 4 Q.B. 180.

Armour, in reply.

January 19, 1909. The judgment of the Court was delivered by

GARROW, J.A.:—Appeal by the plaintiffs from the judgment, at the trial, of Riddell, J., as set out in the appeal book.

In the case stated the questions to be determined are:—

(1) Have or had the claimants any interest in the said lands entitling them to receive compensation from the respondents under the circumstances stated? If so, what is the “interest” and on what principle ought compensation to be ascertained?

(2) If the claimants are entitled to receive compensation from the respondents, with reference to what date ought compensation to be ascertained?

This differs somewhat, but not materially, I think, from the special case stated by the arbitrators, which had three questions, but all involving practically the same point.

The material facts, about which there is no dispute, all appear in the pleadings and in the judgment.

The judgment proceeds upon this, that, although the claimants had no legal title, they still had possession under the lease which expired on June 30th, 1902, and that such possession, with the possibility of obtaining a renewal, for which they had asked, was sufficient upon which to found a valid claim. And the whole question really is whether that conclusion correctly interprets the law.

In considering the numerous cases upon the subject, regard must, of course, be had to the statutory provisions under which they arose and were decided. The Imperial statutes, 8-9 Vict. ch. 20 and 8-9 Vict. ch. 8, have now been in force for many years without material alteration. And, while their provisions are much more extensive and minute than those to be found in the Canadian statutes, I agree with Riddell, J., that for the purpose of the present inquiry there is no such essential difference as to make the cases decided under the Imperial statutes inapplicable in construing ours.

Our Railway Act, R.S.C. ch. 37, as consolidated in 1906, did not, I think, alter the law in any material particular from the condition in which it stood on September 21st, 1903, when the plan was deposited and the rights of the parties to that extent

fixed (see sec. 192), and my references will, for convenience sake, be to it.

Section 155 provides that "full compensation" shall be made "to all persons interested for all damages by them sustained" by reason of the exercise of the powers of expropriation conferred by that Act. Throughout the statute the estate or interest (with some trifling exceptions) assumed to be expropriated is the fee simple; and the compensation, when fixed, shall, it is provided, stand in place of the land: see sec. 213.

By sec. 191, after the expiration of ten days from the deposit of the plan, etc., and the due publication of notice, application may be made to the owners, or to persons empowered to convey or interested in lands which suffer damage from the taking of materials or the exercise of powers, and such agreements and contracts as both parties may deem expedient may then be made touching the lands or the compensation, or for damages, or as to the mode in which the compensation is to be ascertained, and, if they cannot agree, all questions which arise between them shall be settled as thereafter provided, namely, by arbitration.

In the Imperial statutes provision is made for compensation to tenants of various terms, down to that of "a tenant having no greater interest than as tenant for a year or tenant from year to year." See sec. 121 of the Land Clauses Consolidation Act, 1845, the second of those above mentioned. And sec. 122 provides for the compulsory production of the lease in the case of any tenant claiming compensation and having a greater interest than as tenant at will. For the latter no provision of any kind is made, which seems to indicate that a tenant at will was not regarded as a person having an interest in the land. And yet the Imperial Acts extend to "occupiers"—a word not found in our statute—and contain also the more general words, "persons interested in the lands," common to both, in this respect being, therefore, more favourable in its language to a claimant situated as these claimants are than the Canadian statute.

Notwithstanding the use of this word, it was recently said, in the Court of Appeal, by Collins, M.R., that the subject matter

for compensation under the Imperial statute is land or an interest in land: see *Frank Warr & Co. v. London County Council*, [1904] 1 K.B. 713, at p. 717; and the Court there sustained a judgment denying the right of a claimant to what was, undoubtedly, a valuable privilege to occupy land, simply because the privilege did not create an interest in the land itself.

And the same construction must, in my opinion, be placed upon the Canadian statute. The persons "interested" must be persons who have some definite interest in the land itself. The mere possession or occupation as tenant at will, which correctly expresses the legal position of these claimants after their lease expired, is not, I think, sufficient.

In the case referred to by Mr. DuVernet, of *McGoldrick v. The King*, 8 Ex. C. R. 169, the facts were very different, for it was there found that the tenant, after the original lease had expired, remained in possession as tenant from year to year—in other words, he was not a tenant at will, when the expropriation took place. And he was therefore held entitled to compensation for the unexpired portion of his term as such tenant, and also for his improvements.

In *Rex v. Liverpool and Manchester R.W. Co.* (1836), 4 A. & E. 650, the tenant had had several renewals, and even had a verbal promise of a further renewal for seven years from his landlord, on the faith of which he had expended money, and yet the Court held that he had no interest in the land, his lease having, in fact, expired, and could not, therefore, claim compensation. The language of the statute there in question is very similar to that of the general Imperial Act from which I have quoted, and included, as that statute does, "occupiers," as well as owners and persons interested. And in *Syers v. Metropolitan Board of Works*, 36 L. T. 277, it was held by Jessel, M.R., and affirmed by the Court of Appeal, that a tenant, whose term had been duly determined by notice to quit, could not claim compensation, although he, with at least some show of reason, claimed that but for the expropriation proceedings he would probably not have been disturbed. In the recent case referred to in the judgment of Riddell, J., of *Zick*

v. *London United Tramways*, [1908] 1 K.B. 611, also affirmed by the Court of Appeal in 24 Times L.R. 577, it would have been a simple proposition if the plaintiff's possession alone had been sufficient. He, too, was a tenant in possession, but for an unexpired term, which, fortunately for him, had not merged, owing to the imperfect surrender, and the recovery was had not in respect of the possession, but clearly of this unexpired term alone.

These cases are not inconsistent with such cases as the one so much relied on of *Perry v. Clissold*, [1907] A.C. 73; and *Ex parte Chamberlain* (1880), 14 Ch. D. 323; and *Stewart v. Ottawa and New York R.W. Co.* (1899), 30 O.R. 599.

In the last of these cases the learned Chancellor pointed out the scope and principle of such statutes, and shewed that there are really two stages—one, the ascertainment of the party to be dealt with in proceeding to fix the compensation; the other, the right to the compensation itself after it is fixed. And as to the first, it was there held, quite in accordance with the more recent case in the Privy Council, that where a person is found in possession apparently as owner, which is not at all the position of these claimants, he may be dealt with, for the purpose of the first stage, as if he was in fact the owner, and that the statutory body cannot at that stage put him to proof of title. But, after the compensation has been fixed, and has been paid into Court, as it may be (see sec. 210), the person applying for it—who need not have been named in the award: see sec. 205 (2)—would certainly then be required to prove his title before obtaining the money out of Court.

None of these cases, nor, indeed, any of the other cases which, after a somewhat diligent search, I have been able to find, affords any foundation, in my opinion, for the proposition that a person, having no estate and no interest in the land itself—nothing, in fact, but mere possession—has any right to share in the compensation provided for by the statute.

The cases decided under the statute 11 Geo. IV. ch. 20, the Hungerford Market Act, referred to by Riddell, J., are not, in my opinion, at all in point. Section 19 of that statute, the

foundation for such decisions, has no counterpart in our statute nor in the general Imperial Acts. And that they are exceptional was pointed out by Lord Denman, C.J., who presided in them all, in the later case, before referred to, of *Rex v. Liverpool and Manchester R.W. Co.*, 4 A. & E., at p. 656. The cases to which I refer are *Ex parte Farlow*, 2 B. & Ad. 341 (to which Riddell, J., referred with apparent approval), and *The King v. The Hungerford Market Co.*, *Ex parte Gosling* (1833), 4 B. & Ad. 596. Section 19, before mentioned, is as follows:—"All tenants for years or from year to year or at will, who shall sustain any loss, damage or injury, in respect of any interest whatsoever, for goodwill, improvements, tenants' fixtures, or otherwise, which they now enjoy, by reason of the passing of this Act, shall be entitled to compensation."

I have not attempted to follow all the arguments addressed to us by the learned counsel for the claimants. As will have appeared, the material fact upon which I proceed is of the very simplest, and it is this—the claimants are not entitled to compensation because they had on the date in question no estate or interest in the lands. It matters not, in my opinion, how the severance of the reversion, which stood in the way of renewal, came about, nor whether such severance was compulsory or voluntary, or even whether there ever had in fact been a severance at all, the undisputed fact being that the prior lease had expired on June 30th, 1902, and had not been renewed, and no new tenancy created, thus leaving the claimants entirely without title or interest in the land. The lessors were not even bound to renew or to grant a new lease. They had the option to refuse, and in that case to pay for the tenants' improvements. They did refuse, and what (if any) obligation between the claimants and the city follows upon such refusal we are not at present required to nor in a position to deal with.

In my opinion, the claimants, for the reasons stated, have failed to make out a valid claim to compensation, and the appeal should therefore be allowed with costs.

UNPAID TOLLS—SEIZURE.

ONTARIO.]

[BRITTON, J.]

CLISDELL V. KINGSTON AND PEMBROKE R.W. CO.

(18 O.L.R. 169.)

Railway—Carriage of Goods—Delivery to Consignee—Seizure by Railway Company for Unpaid Tolls—Dominion Railway Act, sec. 345—"Seize"—Termination of Carrier's Lien—Demand—Conversion—Damages.

By sec. 345 of the Dominion Railway Act, R.S.C. 1906, ch. 37, a railway company may, instead of proceeding by action for the recovery of tolls upon goods carried, "seize the goods for or in respect whereof such tolls are payable, and may detain the same until payment thereof," etc.:

Held, that a railway company are not, by this enactment, given a lien on property carried, to such an extent and of so general and wide an application as to allow them to re-take goods which have been delivered, and as to which the ordinary carrier's lien has terminated; the section does nothing more than confirm and establish the carrier's lien; there is the right to seize and detain, but the right must be exercised and enforced before there is an absolute and unconditional delivery of the goods to the consignee.

Seem, that in this case there was not a sufficient demand for the tolls due to the defendants, on account of which they seized goods which they had previously delivered to the consignee, the demand being for a gross sum, including a sum for tolls.

Held, also, that the defendants, having converted the goods, were liable for damages; and the measure was the value of the goods.

THIS action was brought by the plaintiff, as liquidator of the Wilbur Iron Ore Company Limited, against the defendants, to recover damages for the removal by the defendants of a quantity of coal from the premises of the Wilbur company, and the conversion of it to their (the defendants') own use. The facts are stated in the judgment.

The action was tried before BRITTON, J., without a jury, at Toronto, on the 22nd February, 1909.

A. W. Holmsted, for the plaintiff.

I. F. Hellmuth, K.C., for the defendants.

March 4, 1909. BRITTON, J.:—The defendants, as carriers, had carried coal for and delivered the same to the Wilbur Iron Ore Company Limited, in large quantities and at different times. On the 10th, 13th, and 15th August last the defendants carried

coal in four cars in all, and on these days delivered that coal to the company named, upon their own property. Upon this coal so delivered the tolls and freight charges had not been paid. The coal was in a pile called a "stock" pile.

On the 31st August the defendants, about six o'clock in the afternoon, took possession of coal from that pile, intending to take, and taking so far as it could be identified, coal that had been carried by the defendants on the 10th, 13th, and 15th August named.

An order for the winding-up of the Wilbur Iron Ore Company Limited was made on the 26th August, 1908, and the plaintiff was on that day appointed liquidator.

It was admitted at the trial that the quantity of coal taken by the defendants was 138 1/10 tons. It was also admitted that the tolls and freight and other charges due the defendants, and unpaid prior to and on the 26th August, 1908, upon the coal taken and upon coal that had been consumed by the Wilbur company, carried on the days mentioned, amounted to \$568.25.

The defendants made reasonable efforts to sell the coal so taken, and failed, and, as the cars in which the coal was placed were required, the coal was mixed with the defendants' own coal and used by the defendants for their own purposes.

The defendants assert a statutory right to follow and seize the coal in question under sec. 345 of the Dominion Railway Act, R.S.C. 1906, ch. 37.

Section 344: "In case of refusal or neglect of payment on demand of any lawful tolls or any part thereof, the same shall be recoverable in any court of competent jurisdiction."

Section 345: "The company may, instead of proceeding as aforesaid for the recovery of such tolls, seize the goods for or in respect whereof such tolls are payable, and may detain the same until payment thereof, and in the meantime such goods shall be at the risk of the owners thereof.

"2. If the tolls are not paid within six weeks, and, where the goods are perishable goods, if the tolls are not paid upon demand, or such goods are liable to perish while in possession of the company by reason of delay in payment or taking delivery by the consignee,

the company may advertise and sell the whole or any part of such goods, and, out of the money arising from such sale, retain the tolls payable and all reasonable charges and expenses of such seizure, detention and sale.

“3. The company shall pay or deliver the surplus, if any, or such of the goods as remain unsold, to the person entitled thereto.”

This section 345 first appeared, in substance, as sec. 234 of 51 Vict. ch. 29. There power was given to the agents or servants of the company to seize the goods, etc. It was, in a slightly changed form, re-enacted as sec. 280 of ch. 58, 3 Edw. VII. (1903).

The word “seize” is relied upon by the defendants. That word does not appear in the corresponding section of the English Act, viz., sec. 97, 8 Vict. ch. 20 (1845).

I am unable to agree with the defendants’ contention that, by virtue of the word “seize,” they are virtually given a lien on property carried, to such an extent and of so general and wide an application as to allow them to retake goods which have been delivered and as to which the ordinary carrier’s lien has terminated. The word “seize,” in practice, generally means “taking possession of the property of a person condemned by the judgment of some tribunal”—see Bouvier’s Law Dict.—or, taking possession of property pending a trial or an adjudication in reference to something which might result in the property being liable, should the adjudication be adverse to the owner. It usually implies force. The ordinary meaning is “to take possession of”—“to lay hold of.” Generally a seizure is made under a writ or warrant or authority or process specially issued in particular cases provided for by law.

The section under consideration does nothing more, in my opinion, than confirm and establish the carrier’s lien. If, while that lien exists and can be enforced, there is, from the circumstances, any condition that renders a seizure necessary, it may be made; if not, there remains the right to detain and dispose of the goods as provided by the section. If the defendants are right, the startling result would be that, without warrant or claim in Court, or legal process, they could follow the goods carried and take them wherever found and at any time after the delivery to the consignee, so long

as the goods retained their original character and could be identified, no matter how long after the delivery—subject possibly to the right of a *bonâ fide* purchaser for value without notice, and so long as the claim as to time would not be barred by the Statute of Limitations. It was not the intention of the Act that there should be any such result. The section was not intended to give the right to seize, where the lien has ceased. There is the right to seize and detain, but the right must be exercised and enforced before there is an absolute and unconditional delivery of the goods to the consignee, as there was in this case. If the defendants had deposited the coal upon the land of the Wilbur Iron Ore Company under an express agreement, or under circumstances from which an agreement could be implied, that it was still liable for the tolls, and that the defendants' lien was not at an end—that it was still within the grasp of the defendants—the seizure might be maintained. I do not say that the word "seize," or "seizure," is not applicable to property in the possession of the carrier. Again, in the case of a carrier having brought goods to their destination, who, being ready to deliver, demands payment of tolls, and pending payment delivers the goods to the consignee subject to such payment, if the tolls are not paid on such demand, the goods carried could be seized, could be retaken and detained. In such a case there would be no abandonment of the lien. The goods would thereafter be held and dealt with by the carrier at the risk of the owner.

Apart from the right to seize upon which this case turns, the rights of carriers as to lien are dealt with in the very recent case of *Lord v. Great Eastern R.W. Co.*, [1908] 1 K.B. 195, [1908] 2 K.B. 54, [1909] A.C. 109.

In the present case the defendants did not proceed to sell the coal, or any part of it, as required by sec. 345. They endeavoured to sell it, and, failing, put it upon their own coal pile, mixed it with their own coal, used a part of it, and intend to use it all. They had no right to do this. This coal, in addition to charges for freight for carriage by the defendants, was liable for freight on other roads and for duty, before it was taken possession of by the defendants. The defendants assumed to seize for the entire

amount, including these back charges, and amounting in all to about \$700.

It was objected that "tolls," as defined by the Railway Act, sec. 3, sub-sec. 30, does not include "duty" or charges for transportation before the coal was received by the defendants. That point is important in justifying a distress. Section 344 requires a demand. If, on demand, there is a refusal to pay, the company may sue, or, instead of suing, they may (under sec. 345) seize. Demand of a gross sum, which includes a sum for tolls not separately stated, will not justify a distress: *Field v. Newport, etc., R.W. Co.* (1858), 27 L.J. Ex. 396. Presentation of a bill which had been given for carriage of goods, and which had been dishonoured, was held not to be a sufficient demand to justify distress: *North v. London and South Western R.W. Co.* (1863), 14 C.B.N.S. 132.

The admissions in this case do not include one that a formal or sufficient demand was made, and the evidence does not establish it. The seizure was made under the direction of the solicitor of the defendants, who was present and directed it. He did not know of the issuance of the winding-up order until after the taking of the coal and loading it upon the cars of the defendants. He was advised of it before the removal of the cars from the siding of the Wilbur company. That, in my opinion, is not material. The defendants did know, before starting to take the coal, of the insolvency in fact of the Wilbur Iron Ore Company.

I find that the defendants did not have the consent of the plaintiff or of the said Wilbur Iron Ore Company to take the coal. The defendants are liable, and the measure of damages is the value of the coal. The Wilbur company being insolvent, and being wound up, had no use for the coal for working purposes. Its fair value at the place where and when taken was \$3.25 a ton. The quantity being admitted as 138 1/10 tons makes the amount for which the defendants are liable \$448.83. I do not allow interest.

The action is for tort. The defendants are not entitled to set off their claim against the liquidator. They will, no doubt, prove against the company in winding-up proceedings.

Judgment for the plaintiff for \$448.83 with costs.

CONTRACT—CARRIAGE BY WATER.

ONTARIO.]

[DIVISIONAL COURT.]

MELADY V. JENKINS STEAMSHIP CO.

(18 O.L.R. 251.)

Contract—Carrier—Carriage by Water—Bill of Lading—Weights and Measures—Bushel—Canadian Standard or American Standard—Applicability of—Compulsory Payment—Freight—Action for Excess—Contract by Telegram.

An agreement was completed in Canada with an American steamship company to carry oats from a port in Ontario to one in the United States, "at the rate of 2½ cents per bushel," and the master of the vessel, as agent of the steamship company, accepted the cargo as measured by weight on the Canadian standard of 34 pounds to the bushel, and so indicated on the bills of lading signed by him at the port, which stated "rate of freight as per agreement."

Held (MAGEE, J., dissenting), that the Canadian standard and not the American standard of 32 pounds to the bushel was to be applied to the contract.

Where, on delivery by vessel of cargo, freight in excess of the amount due was paid as demanded, without protest:—

Held, that nevertheless such payment was not voluntary, since, if it had not been made, expenses for storage, with possibly demurrage and loss by reason of non-delivery to purchasers, would have been incurred; and the excess paid was recoverable by action.

A contract by telegram is made at the place where the telegram of acceptance is sent from.

THIS was an appeal by the defendants from the decision in favour of the plaintiffs of His Honour Judge Morgan, a Judge of the county court of the county of York, under the circumstances mentioned in the judgment, where the facts of the case are fully stated. The appeal was argued before BOYD, C., BRITTON and MAGEE, JJ., on January 19th and 20th, 1909.

G. R. Geary, K.C., for the defendants, contended that the law of the United States was in the mind of the contracting parties, and that the plaintiffs ought to have known that Prenderville had the American standard in his mind: *Lloyd v. Guibert* (1865), L.R. 1 Q.B. 115; that there is no authority to change the contract: *Rodocanachi v. Milburn* (1886), 18 Q.B.D. 67, at p. 73; that the law to govern is that of the place where the contract is to be performed: Dicey's Conflict of Laws, 1st ed., pp. 569-570; *Scott v. Bevan* (1831), 2 B. & A. 78; *The Skandinav* (1881), 51 L.J.P.D. & A., 93; Story's Conflict of Laws, 8th ed., p. 367, sec. 272 (a).

W. N. Ferguson, K.C., for the plaintiffs, contended that the word "bushel" in the bills of lading must be given its ordinary meaning in Canada unless something to the contrary is contained in them; that the law of the place where the contract was made should govern: *Dicey's Conflict of Laws*, 2nd ed., p. 560 *et seq.*; *Wharton's Conflict of Laws*, 3rd ed., p. 919; *Spurrier v. La Cloche*, [1902] A.C. 446, at p. 450; *Hamlyn & Co. v. Talisker Distillery*, [1894] A.C. 202; as to the completion of the contract: *Baston v. Toronto Fruit Vinegar Co.* (1902), 4 O.L.R. 20; *Cole v. Sumner* (1900), 30 S.C.R. 379; *Harvey v. Facey*, [1893] A.C. 552; *Johnston Bros. v. Rogers Bros.* (1899), 30 O.R. 150.

Geary, in reply, referred to *Wharton on Conflict of Laws*, 3rd ed., p. 866; *Dicey on Conflict of Laws*, 2nd ed., p. 560; *Rosseter v. Cahmann* (1853), 22 L.J. Ex. 120.

February 9, 1909. *Boyd, C.*:—The defendant company, carriers, and owners of the steamship "Squire," contracted with the plaintiffs to carry a quantity of oats specified from Fort William, in Ontario, to Buffalo, in the United States, at the rate of 2½ cents per bushel.

Bills of lading were signed in respect thereof directing their delivery to the Bank of Hamilton, and these were indorsed by the bank to the plaintiffs, merchants in Toronto, owners of the oats.

Upon claiming delivery the defendants charged freight at the rate of 2½ cents upon each 32 pounds, the American standard of measurement, which they claimed to be a bushel within the meaning of the contract. The plaintiffs, contending that the Canadian standard of 34 pounds to the bushel was what the contract meant, paid the whole amount demanded, \$2,607.74, and now bring suit for recovery of the excess claimed to be paid, *i.e.*, \$153.

The agreement for carriage was made by telegrams and correspondence from Chicago to Toronto, through *Prenderville & Co.*, agents for the owners of the vessel, the defendants, in the United States, to the plaintiffs at Toronto; and it was briefly expressed: "Charter for one compartment for about 90,000 oats to Buffalo at 2½ per bushel." If anything turns upon it, this contract was

completed at Toronto, and is to be treated as a contract made in Canada. The cases are cited by my brother Magee.

- The oats were delivered on board the steamer at Fort William, and bills of lading given and signed by the master of the ship, also the agent of the defendants, which accepted the cargo as measured by weight on the Canadian standard of 34 pounds to the bushel. That is indicated by the figures giving quantities upon the face of the bills, and it is to my mind the turning point of the appeal. On these bills it is also said, "Rate of freight as per agreement." The documents are thus to be read together. One is incorporated with the other, and there is no inconsistency or discrepancy between them. The agreement specifies the rate of freight to be paid on each bushel, but that term "bushel" is vague or ambiguous so far as weight is concerned; that is to say, there is an American bushel of oats equalling 32 pounds and there is a Canadian bushel equalling 34 pounds. This is a Canadian contract, and *prima facie* I should say the parties contracted as to the Canadian standard of measurement being applied to a Canadian (Manitoba) product shipped from a Canadian port. The silence of the contract as to the method of measurement may be made intelligible by evidence of usage or custom, or other evidence not contradictory of what is expressed therein: see *Russian Steam-Navigation Trading Co. v. Silva* (1863), 13 C.B.N.S. 610. The bill of lading may therefore be properly used for this purpose. No evidence is given by the defendants, or by the master of the ship, or the agents of the ship-owners who mediated the terms at Chicago. In general the powers of the master as agent are as given by Lord Chelmsford in *McLean v. Fleming* (1871), L.R. 2 H.L. Sc. 128, at p. 130: "The bills of lading signed by the master were *prima facie* evidence that the quantities . . . mentioned in them had been received on board the vessel. The master is the agent of the shipowner in every contract made in the usual course of the employment of the ship . . . As it is not to be presumed that he has exceeded his duty, his signature to the bills of lading is sufficient evidence of the truth of their contents to throw upon the shipowner the onus of falsifying them."

In the last edition of Smith's Mercantile Law, (11th ed.,) vol. 1, p. 426 (1905), it is stated: "Unless the mode of calculating the weight or measurement of the cargo is indicated by the contract itself or the usage of the particular trade, it seems that freight will be payable according to the mode of computation at the port of lading." He cites the case from which I proceed to quote. Bowen, L.J.A., in *Spaight v. Farnworth* (1880), 5 Q.B.D. 115, at p. 118: "Inconvenience in practice must obviously often arise unless some one measurement of the quantity delivered is agreed upon for the purpose of the calculations of freight . . . There is nothing accordingly unnatural that the ship and the charterer should agree that freight is to be paid on the measurement figures arrived at at the port of lading." This language indicates to my mind that it is quite within the competence of the master to accept the freight on the footing of a 34-pound-to-the-bushel standard of measurement; and, failing all other evidence, that his signature to that effect binds his principal, the present defendants. Thus reading the prior agreement and the completion of its unmentioned but necessary terms in the bill of lading, I do not need to resort to any consideration as to the cases cited to us on the conflict in private international law. The complete contract is governed and is to be interpreted by its own terms, which upon all the evidence given entitles the plaintiffs to succeed.

The first defence set up, that the contract was for payment of freight at the rate of 32 pounds to the bushel, is, I think, negatived. The second defence, that the over-payment was made voluntarily and can not be recovered, is amply answered by the decision in *Shand v. Grant* (1863), 15 C.B.N.S. 324, which in its facts as to the payment is on all fours with the present. The same point as to the recovery of unpaid freight was long ago decided in *Geraldes v. Donison* (1816), Holt 346.

The judgment should be affirmed and the appeal dismissed with costs.

BRITTON, J.:—The plaintiffs, by their agents at Fort William, shipped on board the defendant's vessel, the "F. B. Squire," a

large quantity of Manitoba oats, called 98,163½ bushels, to be carried from Fort William to Buffalo. There was an agreement between the parties that the freight on these oats was to be 2½ cents per bushel. This contract, as to rate, was made by plaintiffs through Prenderville & Son, agents for the defendants at Chicago. Prenderville & Son resided at Chicago, and the plaintiffs knew that they were, and for years had been, recognized freight brokers at Chicago, and then acting for the defendants. The contract as to rate, and that the oats were to be carried, was made by correspondence, which ended by Prenderville & Son confirming charter for space on the steamship "Squire" for quantity of about 90,000 bushels of one-grade oats, at 2½ cents a bushel. Nothing was said by either party in this correspondence as to number of pounds to a bushel of oats. As a matter of fact, 34 lbs. to the bushel is Canadian standard and 32 pounds to the bushel is United States standard. The further facts are that the steamer "Squire" was of United States registry, and her owners had their residence and chief place of business in the United States. The oats were Canadian oats, and at time of contract were, and were shipped at Fort William.

The whole facts distinguish this case from cases cited, and present some questions of nicety and difficulty for determination.

The correspondence as to rate of freight,—as to vessel space, and for carrying the oats from Fort William to Buffalo, between the plaintiffs at Toronto and the agents of the defendants at Chicago, was not the whole of the contract. The oats were shipped at Fort William by the plaintiffs' agents, and received by the captain of the defendants' vessel, under bills of lading which added other terms, so that the whole contract, made in part with the defendants at Chicago and in part with the defendants' agent at Fort William, must be looked at. The plaintiffs' agents at Fort William were Coffee, Hargraft & Co., and they shipped these oats, consigned to the Bank of Hamilton, Buffalo, pursuant to the terms of eleven bills of lading, all of the same tenor, and subject to these special conditions:—

"(a) Rate of freight as per agreement.

“(b) All deficiency in the cargo to be paid by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee.

“(c) In case the grain becomes heated while in transit, the carrier shall deliver his entire cargo, and pay all deficiency exceeding five bushels for each 1,000 bushels.”

Then the shipment of the whole of the oats in question, as mentioned in the eleven bills of lading, was in fact made according to the Canadian standard of 34 pounds to the bushel. In one shipment, part of the total of 98,163 $\frac{1}{4}$ bushels, special attention was called to the standard, as that shipment consisted of 3,163 $\frac{1}{4}$ bushels. These bills of lading were signed by the captain of the “Squire,” who was defendant’s agent for the purpose.

The oats were safely carried to Buffalo, and upon their delivery there, freight was claimed by the vessel, and paid by agents of the consignees, at the rate of 2 $\frac{1}{2}$ cents per bushel of 32 pounds, instead of per bushel of 34 pounds.

I think as to quantity the defendants are bound by the bills of lading. It is somewhat singular that in a commercial case, and in reference to what one would suppose to be an almost every-day occurrence in shipping circles, no recent case could be cited upon the precise point involved.

There is a case which is the converse of the present and which is applicable: *Moller v. Living* (1812), 4 Taunt. 102. That was an action for freight. The bill of lading of a cargo shipped at Dantzic on board a Prussian vessel, expressed it to be 100 lasts in 2,092 bags. The consignee had purchased it for that quantity in English measure, but it did not amount to that quantity by the Dantzic measure, which is larger. Held, that the master was entitled to the freight according to the measure in the bill of lading and exceeding the freight computed by the Dantzic measure. Mansfield, C.J., said, at p. 104: “We are of opinion that we cannot distinguish this contract from the usual case of written contracts, where there is no ambiguity, and that on this contract the captain has agreed to carry, and the freighter has agreed to pay for, the quantity mentioned in the

contract, and that is 100 lasts; that they are bound by the words of this bill of lading as they would be by any other written instrument; and that it is irrelevant for them to inquire whether it is Dantzic measure or English measure; the instrument describes not merely 100 lasts, but 100 lasts very specifically mentioned as contained in so many bags; and I am of opinion that if evidence had been offered, as in truth it was not, for shewing what was the real quantity, it ought not to have been received."

This is not the simple case of payment of a certain sum of money in a foreign country. Payment in such a case would be in the currency of the country where it is payable, and assuming in the present case the freight to be payable upon delivery of the oats at Buffalo, payment would be in the currency of the United States, but payment for what quantity? That depends upon the contract made at Fort William. The oats were in bulk; it was a cargo of oats which consisted in fact at that port of 98,163 $\frac{1}{4}$ bushels at 34 pounds to the bushel, and the master of the vessel received them, as of that quantity, and so can charge freight only on that quantity.

Then, I think the intention of the parties, as gathered from all the evidence, was that the measurement of oats put on board the boat was to be taken as the measurement on which freight was quoted, and was to be paid.

Spurrier v. La Cloche, [1902] A.C. 446, is authority for the proposition that (at p. 450) "where the parties to a contract reside in different countries in which different systems of law prevail, their intention is the true criterion, by which law its interpretation and effect are to be governed."

My decision is not in conflict in any way with the decision in *Rodocanachi v. Milburn*, 18 Q.B.D. 67, that in the absence of express provisions to the contrary, as between the shipowners and the charterers, only the charter party could be regarded as constituting the contract, and the bills of lading must be looked upon only as a mere receipt for the goods. Here the contract for rate of freight, and for mere transportation, does not cover what is in the bill of lading, and what is in the bill of lading is supplemental

to, and not inconsistent with, the correspondence part of the contract, as part of the entire contract between the parties.

I regard this as different from the sale of the oats. If sold in Canada to be delivered in the United States, and sold according to measurement, and measurement not expressly mentioned or defined, measurement at the place of delivery must prevail, but there was in this case delivery to the defendants in Canada for the purpose of this contract.

Lloyd v. Guibert, L.R. 1 Q.B. 115, was cited by counsel for the defendants. That case decides, at p. 129, that "where the contract of affreightment does not provide otherwise, there, as between the parties to such contract, in respect of sea damage and its incidents, the law of the country to which the ship belongs should govern." I find this not against the plaintiffs' contention here, but rather in favour of it, on general principles. The case is a most instructive one. Willes, J., in giving judgment, after discussing the diversity of opinion and conflict of laws in regard to maritime matters, says, at p. 123, "that the rights of the parties to a contract are to be judged of by that law by which they intended—or rather by which they may justly be presumed to have bound themselves." Again he says, at p. 127: "Further, it must be remembered that although bills of lading are ordinarily given at the port of loading, charter parties are often made elsewhere, and it seems strange and unlikely to have been within the contemplation of the parties that their rights or liabilities in respect of the identical voyage should vary, first, according as the vessel was taken up at the port of loading or not; and secondly, if she were taken up elsewhere, according to the law of the place where the charter-party was made, or even ratified."

The case of the "*Skandinav*" (1881), 50 L.J.N.S., P.D. & A., p. 46, would seem a strong case in the defendants' favour if the headnote of the case was wholly warranted by the decision—even if the first decision had stood. In that case by the charter-party it was agreed that the "*Skandinav*" should proceed to a good and safe port in Westervicks customs-house district, and there load a full and complete cargo of props and proceed to a safe port

on the east coast of Great Britain, and deliver the same on being paid freight at and after the specified rate—all British Sterling—in full per 180 English cubic feet, taken on board as per Gothenburg custom. The cargo was taken on board not measured; the owners refusing to measure. The master attempted to get a lump sum for freight, which was positively refused, and the master was told that he must submit to the measuring in Hull of the "Skandinav's" cargo. The master then accepted the bill of lading, adding these words to it: "Number of pieces, measure and quantity unknown, free from damage; cargo to be measured up at port of discharge at charterer's expense, according to his telegram." Sir R. J. Phillimore decided, on appeal from the county court Judge, that the words quoted must be construed to mean, "loaded on board according to the custom of loading at Gothenburg," and that the contract was, "to be laden on board according to the custom at Gothenburg, but to be measured at the port of delivery according to English measurement." On appeal, Sir R. J. Phillimore was reversed—see 51 L.J.P.D. & A. 93—and it was held that the Court must adopt a construction which has a meaning with reference to the facts of the case. It was proved that there was a particular custom or method of measuring props in use at Gothenburg. There was no other custom to which the words in the charter-party could apply but that custom, so the measurement, according to that Gothenburg custom, was made at Hull. This decision does not establish any rule. It is a decision as to the construction to be put upon certain words in the bill of lading. There is nothing in that case against my view that the facts in the case in hand warrant the conclusion that the determination of the number of pounds to a bushel, or what constitutes a bushel, on which plaintiffs were to pay freight, is to be according to the standard of measurement at port of shipment.

I repeat, there is a difference between a contract to carry and a contract of sale of goods to be delivered in a foreign country. In a contract with a carrier it is an incident that the freight is only payable upon arrival at the port of discharge, but delivery, for the purpose of the contract to carry, is made, and the quantity generally

determined, on shipment. It was so in this case, but because the vessel must fulfil its contract, and must satisfy the owners of the cargo that they have done so, the cargo must be weighed or measured out at the end of the voyage; especially so in this case, where it is part of the contract to pay for shortage, and to get payment for excess, and to deliver all, even in case of grain damaged *en route*.

This case seems to me to be within the rule stated in *North-West Transportation Co. v. McKenzie* (1895), 25 S.C.R. 38, where it was held that the whole of what took place must be looked at to find the true contract. The undisputed facts are, that the defendants were bound to furnish a vessel of about 90,000 bushels capacity, and that the plaintiffs need not furnish a cargo of more than "about 90,000 bushels"; that the quantity actually carried was 98,163 $\frac{1}{2}$ bushels by the larger measure; that the rate was fixed at 2 $\frac{1}{2}$ cents a bushel; that a bushel might be one of 32 pounds or one of 34 pounds; that the master of the vessel assumed to take the oats on board at 34 pounds to the bushel. Upon these facts, the intention to carry at 2 $\frac{1}{2}$ cents per bushel of 34 pounds must be inferred, and the owners of the vessel must be bound by the captain's act in signing these bills.

The defendants say that in any event, as the money was voluntarily paid it cannot be recovered. When the oats arrived at Buffalo, the freight was paid in the usual course by or on behalf of the consignee and for the plaintiffs, as demanded by the captain of the vessel. The learned Judge says the freight was paid under protest. I do not find that there was any protest at time of delivery. In fact, no question or discussion arose then as to the number of pounds to the bushel of oats, and apparently there was then no thought of the difference between the Canadian and United States standards. The freight as demanded was paid and charged against the oats, which were sent forward by rail, on their way to the sea. This can hardly be called a voluntary payment. It was compulsory, as unless paid the oats would have been held at Buffalo at large expense for storage, with possible demurrage, and

possible loss by reason of non-delivery by the plaintiffs to purchasers in the time agreed on.

This money was paid under a supposed legal obligation to pay. It was paid in mistake or ignorance of fact—as in this case the measurement of the oats: see Leake on Contracts, 5th ed., p. 64; *Newall v. Tomlinson* (1871), L.R. 6 C.P. 405.

There was a claim for the freight on 210 bushels of oats, short delivery. That was properly disallowed by the learned trial Judge. These oats were paid for at the market price of oats at Buffalo. This was in accordance with the contract in the bill of lading. The market price at Buffalo would be at least the market price at Fort William plus the freight to Buffalo, so the plaintiffs, paying for the oats as if delivered at Buffalo, were entitled to the freight to Buffalo on these oats so paid for.

For the reasons above, I think the appeal should be dismissed and with costs.

MAGEE, J.:—If there was a contract in this case it was completely made on October 18th, 1905, between the plaintiffs and the defendants' agents, Prenderville & Son, shipping brokers of Chicago. On that date the latter telegraphed: "We confirm charter one compartment steamer Squire capacity about ninety thousand one grade oats loading about Friday two and half confirm quick." They had been negotiating since October 12th for carriage of varying quantities of oats, 50,000 up to 250,000 bushels, for the plaintiffs, from Fort William to Buffalo. By the words "we confirm," Prenderville & Sons plainly said, "If you accept this no further word from us is needed." The plaintiffs at Toronto did accept by telegraphing "O.K. one compartment ninety thousand." That completed the agreement if the parties mutually understood each other, or if they must be taken to have done so. They might thereafter dispense with bills of lading or they might dispute over their terms, but this contract was binding, and the shipmaster could not, without authority from his employers, the defendants, change it: *North-West Transportation Co. v. McKenzie*, 25 S.C.R. 38; *Pearson v. G'schen* (1864), 33 L.J.C.P. 265; *Rodocanachi v. Milburn*, 18 Q.B.D. 67; *The Canada* (1897), 13 Times L.R.

238; *Harris v. Carter* (1854), 3 E. & B. 559. The subsequent bills of lading of October 21st form no part of the contract as to the defendants' remuneration thus settled. Those bills did crystallize into terms mutually satisfactory, what each party understood to be the conditions and risks of shipment implied in their bargain of three days before, but if they had not agreed the law would have implied such as were proper. So far as concerns the question here involved, they were in fact no more than receipts or acknowledgments for the quantities of goods therein stated—just as in *Rodocanachi v. Milburn* and *North-West Transportation Co. v. McKenzie*.

The contract being thus closed by those telegrams, where was it made? Had the communication been by post, the mailing at Toronto of a letter of acceptance by the plaintiffs would have effected the necessary assent of both parties and the contract would be deemed to be made at Toronto: *Magann v. Auger* (1901), 31 S.C.R. 186; *Dunlop v. Higgins* (1848), 1 H.L.C. 381; Addison on Contracts, 10th ed., p. 17. The plaintiffs did, in fact, mail a letter on October 19th confirming the acceptance, but for good or ill the telegram had effected that on the previous day. That there might be a difference between the post office and a private telegraph company as the intermediary was recognized by Willes, J., in *Godwin v. Francis* (1870), L.R. 5 C.P. 295, at p. 303, but in *Cowan v. O'Connor* (1888), 20 Q.B.D. 640, it was held that the telegraph was a mere means of communication, as if one were speaking to the other, and that a telegram sent from within the city of London accepting an order by telegraph from outside the city completed the contract within the city and gave jurisdiction to the mayor's court. On the same principle this contract, if any, was made in Toronto. This conclusion seems also to be in accord with most of the American authorities. See 9 Cyc. 295.

In interpreting the contract, as also in ascertaining what law should govern it and their rights under it, we have to ascertain the intention of the parties. In so far as they have expressed themselves clearly and without ambiguity, the contract is its own law and its own interpreter. We are to look at all that passed

between the parties: *North-West Transportation Co. v. McKenzie*, 25 S.C.R. 38. I am unable to discover in this correspondence any thing to shew that these defendants or their agents contemplated a bargain with reference to any bushels other than those known to them—that is, the American bushel of 32 pounds weight. They were, it is true, dealing with Canadians to carry Canadian grain from a Canadian port, and the contract in a legal sense was made in Canada. But they, Americans in an American shipping market, were asked to provide an American vessel to bring that grain to an American port. There was no reason for dealing in Chicago except that it was a shipping market. Twice previously, on October 18th, the plaintiffs telegraphed “bidding” a rate for carriage of 250,000 and 100,000 bushels. Surely an American shipowner might fairly consider that the bushels referred to in those bids were the same sort of bushels as to which he was receiving or making bids with his own countrymen, even though it was to go to a foreign port. In their letters Prenderville & Son speak of their market and “our” boats, and refer to the rates from Duluth, without hinting at any difference in the measures, and they refer to the capacity and space. Now throughout it all the plaintiffs were aware of the difference in the two countries as to the bushel. They had shipped oats from American ports, and always paid on the basis of a bushel of 32 pounds. They had never before shipped oats from a Canadian port to an American port. That trade had grown up within two or three years. Prenderville & Son, in their letter, put in apparently by consent, say they did not know of any difference and thought the bushels were the same—32 pounds—on both sides of the line. The plaintiffs do not claim that Prenderville & Son did in fact know otherwise. Knowing as they did of the different standards, one would have expected the plaintiffs to have called attention to it or made clear what they meant. Also, it is to be noted that nowhere in the correspondence is there any intimation that the oats were going beyond the State of New York. If dealt with there it would be on the basis of American bushels, and they would be subject to duty on the same basis. Possibly all parties, however, had in mind export to Europe, which is what

actually occurred. In any case, the freight was to be payable at Buffalo on the quantity delivered there at the most, and for that purpose the cargo would have to be measured there, where apart from agreement the 32-pound bushel is the standard. No usage in the trade is proved beyond the fact that at Fort William the bushel is 34 pounds and in the United States it is 32 pounds. Knowledge of that usage at Fort William or elsewhere in Canada is not attempted to be brought home to the defendants or Prenderville & Son: *Robertson v. Jacobs* (1845), 2 C.B. 412. The trade in Canadian oats is only two or three years old. In the great commodity wheat there is no difference in the standard, 60 pounds. From the documents themselves, an intention such as the plaintiffs insist on cannot be found in the minds of the defendants.

We have to deal with the case on principle. The difference between these parties is only about six or seven per cent. That, however, might be the difference between profit and loss. It might well be such a difference as in *Keating v. Dillon* (1905), Q.R. 28, S.C. 323, 2,240 pounds or 2,000 pounds to the ton of coal, or that in *Nielsen & Son v. Nearne & Co.* (1884), 1 Cab. & Ell. 288, where at St. Petersburg 100 feet of deals was really 165 feet. In such a case as the latter would it be reasonable to expect the shipowner asked to provide a vessel with capacity for so many hundreds to provide one with capacity for that many times 165, and should he be liable for damages if on arriving at St. Petersburg he was unable to take all on board?

In *Lloyd v. Guibert*, L.R. 1 Q.B. 115, Willes, J., said, at p. 127: "In favour of the law of Denmark, there is the cardinal fact that the contract was made within Danish territory, and further, that the first act done towards performance was weighing anchor in a Danish port." What is done at that stage should be in accord with what is to be done afterwards. Should a party then be asked to do afterwards that which is not supposed to be in contemplation and prepared for from the first? I find nothing to indicate to Prenderville & Son that they were expected to conform to a measurement which they did not know. They were addressed in a commercial language which they understood, and they were not in-

formed that the words were used as those of another language. The plaintiffs, on the other hand, knew of the double meaning.

There being nothing in the correspondence nor in any usage shewn to be known to the defendants or their agents, is there any rule of law under which the defendants are to be held to the 34-pound standard? As between the laws of the various countries in which such a contract may be effected or in whole or part performed, the intention of the parties as to which they are to be governed by is, if possible, to be ascertained. It may be the law of the place where the contract is made or that of the place where it, or some part of it, is to be performed, or that of the country to which the ship belongs, or it may be in part one or other. In this case these all resolve themselves into Canadian or American law. If American law is to govern it is conceded that the plaintiffs fail. If Canadian law is applicable it can only be for one or both of two reasons—that the contract was made in Canada or that the cargo was to be loaded in Canada. The former reason may be eliminated. It was a mere chance, it may be said, that the contract was closed here, and the rights of the parties were not intended to depend on that. If instead of accepting Prenderville & Son's offer the plaintiffs had answered offering two cents a bushel and that had been accepted, the contract would have been made in Chicago, and yet the bushel in contemplation of both would be just the same. Its definition could not be intended to fly to and fro with the telegrams.

Then, does Canadian law apply to this question merely because the cargo was to be obtained at Fort William? I find no case, and none was cited, in which the place of loading by itself was taken as the criterion. In *Lloyd v. Guibert*, L.R. 1 Q.B. 115, it was not even argued that it would be. In that case the Court laid down the general rule that where the contract of affreightment does not provide otherwise there, as between the parties to it, the law of the ship should govern in respect of sea damage and its incidents. In *Re Missouri Steamship Co.* (1888), 42 Ch.D. 321, Chitty, J., referred to that decision to shew that the principle upon which it proceeds is applicable not merely to questions of

construction and the rights incidental to or arising out of the contract of affreightment, but to questions as to the validity of stipulations in the contract itself, and at p. 328 he said: "It is just to presume that in reference to all such questions the parties have submitted themselves to the law of one country only, namely, that of the flag; and so to hold is to adopt a simple, natural and consistent rule." He held that the contract was governed by the law of the flag—that is, of England—but also that from special provisions of the contract it appeared the parties were contracting with a view to English law. On appeal his judgment was affirmed, the Court of Appeal dealing with the latter ground. Lord Halsbury, L.C., at p. 336, said: "Now, this is a contract for the conveyance of cattle from Boston to England by sea on board a British ship by a British company whose domicile is in England. Those circumstances, though very strong, would, perhaps, not be conclusive." Fry, L.J., at p. 341, says: "England was the place to which the goods were to be brought and the place at which the final completion of the contract was to take place." So here Buffalo was the place for final completion. That case was the same as this, with the nationalities reversed.

In *The Wilhelm Schmidt* (1871), 25 L.T. 34, a contract was made in Constantinople in the English language between Germans for a German ship to carry goods from Constantinople to (as ultimately settled) England. Sir R. Phillimore, J., said, at p. 38: "When the place of performance was fixed to be in England, the seat of the contract, to use the expression of foreign jurists, would be in that country, and the law of the country would be the law of the contract."

In *Meyer v. Dresser* (1864), 16 C.B.N.S. 646, Byles, J., at p. 664, said: "In this case the contract, although made in Prussia, was for the delivery of a cargo in England and for the payment of the freight in England. This, therefore, is a case in which the contract is to be interpreted by the law of the country where it was to be performed, not by the law of the country where it was made."

Upon these authorities it must, I think, be taken that this alleged contract was governed either by the law of the flag or the

law at Buffalo. That is, in either case, American law. It being then to be interpreted by that law, the plaintiff would fail.

In truth, however, I think the plaintiffs cannot be heard to say that there really was a contract. The two parties never meant the same thing—one had in mind 90,000 bushels of 34 pounds each, the other of 32 pounds each.

In *Smidt v. Tiden* (1874), L.R. 9 Q.B. 446, where the bills of lading said "freight as per charter party," and there were two charter-parties at different rates of freight, each party knowing only of one and each having a different one in mind, the parties were held not to be *ad idem*, and the action for freight failed. In *Raffles v. Wichelhaus* (1864), 2 H. & C. 906, each party had in mind a different steamer "Peerless" by which the cotton sold was to arrive, and it was held there was no contract.

In *Keele v. Wheeler* (1844), 7 M. & G. 665, one meant four per cent. bonds and the other five per cent. bonds. And see *Riley v. Spotswood* (1873), 23 C.P. 318.

If there was really no contract, then the defendants would be entitled to a *quantum meruit*, and the plaintiffs have not proved that they paid more, and so the action would fail.

I have been dealing with the rights of the parties as they were up to the loading of the vessel. Did the shipmasters' action or the bills of lading affect the position? Here I have the misfortune to differ from the other members of the Court.

On October 21st the oats were weighed out of the elevator and loaded on the vessel. The total weight was 3,344,738 pounds, which, being divided by 34 gave 98,163 bushels and 32 pounds, and the shipmaster signed ten bills of lading for 9,500 bushels each and one for 3,163½ bushels. There is no evidence who prepared the bills. Usually they would be filled up by the shipper, in such number, and for such quantities, and with such names as he desired, and are *prima facie* evidence of quantity against each: Carver on Carriage by Sea, 3rd ed., 55 to 58; as against the master conclusive: R.S.C. 1906, ch. 118, sec. 3; R.S.O. 1897, ch. 145, sec. 5. These bills did not say Canadian bushels, but I do not think they can be read otherwise than if they had. By whomsoever they were

filled out they were, as to the quantities, merely an acknowledgment. If they had been expressed in pounds, or kilogrammes, hectolitres, American bushels, or Imperial hundredweights, it would have had no greater effect. I do not know that the master could have refused to sign for any of these denominations. He was taking no part in the bargain as to the freight. The bills expressly abstain from so doing, and say "rate of freight as per agreement." If he was assuming to interfere with the bargain made by his employers the cases I have already referred to establish that he could not. If he was assuming to make a new bargain, that, as between the parties to the old one, would be ineffectual: *Göschén v. Pearson*, 33 L.J.C.P. 265. If, indeed, the plaintiffs had refused to be bound by the old bargain, then he, being in a foreign port, might, perhaps, without prejudice to it, make a new one with them, but, as in *Göschén v. Pearson*, the goods loaded—as presumably these were before the bills were signed—would be subject to the former contract. His employers had taken the matter of their remuneration out of his hands, and whether intentionally or unintentionally, he would not, towards the persons who contracted with the employer, have power to change what they had done. Even if they had not effected a contract, but thought they had, none the less that part was not committed to him. That all parties thought there was an existing contract is shewn by the references to it in the bills of lading.

The statement of quantities in the bills of lading could, I think, be properly used by the plaintiffs for one purpose. Under our Weights and Measures Act, R.S.C. 1906, ch. 52, sec. 20, a bushel is a measure of capacity, not weight, and contains 80 pounds of distilled water. By sec. 24 every contract made in Canada for carriage of goods is deemed to be in one of the measures referred to in the Act, otherwise to be void, and by sec. 27 the use of local and customary measures is prohibited. Here is a distinct provision that for carriers the bushel is a measure of capacity. It is true that under the Inspection Act, R.S.C. 1906, ch. 85, sec. 90, in contracts for sale and delivery, the bushel of oats is declared to be 34 pounds weight unless the parties stipulate for a bushel of capacity, but that does not apply to carriage. It may be that, although the

contract was made in Canada, yet if the goods were to be measured in the United States according to their measures the Act would not apply: *Rosseter v. Cahmann* (1853), 8 Ex. 361; but that would be fatal to this action. Or it may be that, if expressed to be a bushel of 34 pounds, the reference to the pounds would suffice: *Jones v. Giles* (1854), 10 Ex. 119, and S.C. in error, 24 L.J.Ex. 259; *Hughes v. Humphreys* (1854), 3 E. & B. 958. But here there was no such definition in the contract. We may assume, as the parties here have assumed, that the American pound is the same as the Canadian. No evidence is given of the capacity of the American bushel, which I believe is in fact only about one-thirtieth, and not one-seventeenth, less than the capacity of the Canadian (*vide* Standard Dictionary and Encyc. Americana). The admission is that the American bushel of oats weighs 32 pounds. Both at Fort William and at Buffalo the number of bushels was ascertained by weight, and dividing the number of pounds by 34 at the former, and by 32 at the latter place. Now, it appears in evidence that oats vary greatly in weight, even so much as from 30 to 48 pounds to the bushel. Manifestly, the 32 and 34 pound standards in the two countries are arbitrary figures, based, perhaps, on the experience of average weight over large areas and in various years in each country, if the latter be not on a commendable Canadian desire to give good measure. These particular oats may have weighed 31, 32 or 35 pounds to the bushel. The plaintiffs have given no direct evidence of their actual bulk. Cubic measure has not been dealt with by either party. The amount paid is well within the possibility of that due for the actual space the oats may have occupied. If Canadian law of capacity and not Fort William or Canadian usage as to weight were to apply, the onus would be on plaintiffs to shew that they have been charged for too much space. For that purpose the bills of lading would afford a fair inference, in the absence of anything to the contrary, that the master was satisfied these did not weigh more than those on which Parliament based the 34-pound standard.

Considering, as I do, that whether there was a contract or not the plaintiffs should fail, the defendants' appeal should, I think, be allowed.

NEGLIGENCE—ORDER OF RAILWAY & MUNICIPAL BOARD.

ONTARIO.]

[COURT OF APPEAL.

McGRAW v. TORONTO R.W. Co.

(18 O.L.R. 154.)

Street Railways—Negligence—Front Vestibule—Closing of—Requiring Entrance of Passengers by Rear of Car—Order of Railway and Municipal Board—Injury to Passenger in Attempting to Enter by Front Door—Terms of Order—Necessary to Give Notice of—Finding of Negligence on One Ground—Effect of Negativng Negligence on Other Alleged Grounds.

In compliance with an order made by the Ontario Railway and Municipal Board, the front platform of the defendants' cars was enclosed by a vestibule having a swing door, fastened by a spring lock on the inside, capable of being opened by the motorman to permit the exit of passengers. The plaintiff, not being aware of this order, attempted to get on a car so equipped at the front, and while so doing, the car started and she was thrown to the ground and injured. She asserted that the motorman saw her standing on the step, and notwithstanding started the car. There was no notice on the door notifying the public of the non-admission by that door. On a charge to the jury that they might find on one or all of the following grounds of negligence, namely, (1) the omission of a non-admittance notice, (2) starting the car while the plaintiff was on the step, and (3) in not opening the door and letting the plaintiff in, they found that the defendants' negligence consisted in the omission to have a non-admittance notice on the door, and did not make any finding as to the other alleged grounds of negligence.

The Divisional Court, on appeal to it, while holding that the ground of negligence found by the jury was not tenable, in that the company were merely obeying the board's order, which did not require any such notice, directed a new trial on the other alleged grounds of negligence.

The Court of Appeal, while affirming the judgment of the Divisional Court as to the ground on which the jury found not constituting negligence, reversed the judgment granting a new trial, holding that the finding of the jury was tantamount to a finding negativng negligence on the other alleged grounds.

THIS was an appeal from the judgment of the Divisional Court, setting aside judgment for the plaintiff in an action brought by her to recover damages sustained through the alleged negligence of the defendants.

The action was tried before FALCONBRIDGE, C.J.K.B., and a jury, at Toronto, on March 9th, 1908.

The learned Chief Justice submitted questions to the jury, which, with their answers, were as follows:—

1. Were the injuries which the plaintiff sustained caused by any negligence of the defendants? A. Yes.

2. If so, wherein did such negligence consist? A. No "no admittance" notice on outside door.

3. Or were the plaintiff's injuries caused by any negligence on her part? A. No.

4. If so, wherein did her negligence consist?

5. Could the plaintiff by the exercise of reasonable care have avoided the accident? A. No.

6. If you answer "yes" to the last question, what could she have done to avoid the accident?

7. At what sum do you assess the compensation to be awarded her, if she is entitled to any? A. \$750.

Upon these findings the learned Chief Justice entered judgment for the plaintiff for the \$750.

From this judgment the defendants appealed to the Divisional Court.

On May 18th, 1908, the appeal was heard before MEREDITH, C.J. C.P. MACMAHON and TEETZEL, JJ.

H. H. Dewart, K.C., for the appellants.

T. C. Robinette, K.C., for the respondents.

July 23, 1908. TEETZEL, J.:—Appeal by defendants from the judgment of Falconbridge, C.J., upon the findings of a jury awarding the plaintiff \$750 damages.

Section 79 of the Ontario Railway Act, 1906, sub-sec. 1, provides: "All cars in use for the transportation of passengers in November, December, January, February, March and April in each year, which, while in motion, require the constant care or service of a motorman upon the platforms of the car or upon one of them, shall have their platforms so enclosed as to protect the motormen from exposure to wind and weather in such manner as the board shall approve."

Application having been made to the Ontario Railway and Municipal Board on behalf of the employees of the Toronto Railway Company, the board, under the provisions of secs. 17, 18 and 19 of the Ontario Railway and Municipal Board Act, 1906, on the 17th May, 1907, ordered that "the front platforms of all cars used by

the respondents (the defendants herein) in the city of Toronto shall, on or before the first day of November, 1907, be enclosed to protect the motormen from exposure to wind and weather in the following manner, to wit, by a door to be fastened by a spring-lock on the inside so as to be capable of being opened by the motormen to permit of the exit of passengers."

Though not embodied in the formal order issued, the board in delivering judgment made these observations: "It will be necessary, however, to prevent passengers from entering the car by this front vestibule door. This arrangement will make it necessary for passengers to enter from the rear end of the car and leave the car by the front vestibule door. The board are of opinion that it will be no hardship on the travelling public to submit to this discipline."

The car in question was equipped in the manner prescribed by the order.

On December 1st, 1907, the plaintiff, not being aware of the order and of the new equipment, attempted to get on the car at the front. She says the door being closed she stood on the step waiting for the motorman to open it for her, and when he did not open it, she knocked on the door, and "he just pointed with his thumb for me to go to the back of the car, but he did not offer to stop his car at all and I fell."

The motorman denies having seen the plaintiff or having heard her knock on the door, or having motioned to her as alleged by the plaintiff.

There was no notice on the door informing the public that there was no admission through it.

The jury were asked:—

(1) Were the injuries which the plaintiff sustained caused by any negligence of the defendants?

(2) If so, wherein did such negligence consist?

Their answer to the first question was "Yes," and to the second "No 'no admittance' notice on outside of door." They also negatived contributory negligence, and assessed the damages at \$750.

In his charge the learned Chief Justice told the jury that "the

plaintiff charges that there were three different matters of negligence, any one of which you may find, or all of them; first, in that there was no notice on the door that the door was closed for entrance; second, in starting the car, if you find it to be the case, when she was already on the step; thirdly, in not opening the door to let her in. There is no particular comment that I have to make upon those except this, that with reference to the third one that will involve the finding whether the motorman actually saw her or not. You have heard the evidence about that, whether he saw her, or whether he ought to have seen her, because it amounts to the same thing. It is pointed out that is a very serious charge to make against a man that he would be guilty of such absolute inhumanity as to continue driving a car at an increasing rate of speed if he actually saw a poor girl hanging on there; but if he did not see her and ought to have seen her the negligence of the company is the same thing."

The first question for determination is whether the specific finding of negligence, in answer to the second question, can be supported.

That there was no notice on the door intimating that it was closed for entrance was not disputed. I am of opinion that in the circumstances of this case the omission to provide any such notice was not an act of negligence by the defendants. The defendants by putting the door on complied strictly with the order of the board. That order made no provision for notice, and there is nothing in the circumstances of the case which would impose any duty on the defendants to put up such a notice. The closed door itself, with no facility for opening it on the outside, was ample notice to the public that it was not intended for ingress. Putting the door on was not the voluntary act of the defendants, but a duty imposed upon them by authority of the Legislature, for the non-performance of which they would be subject to penalties. Having performed this duty to the letter, they should not be liable for negligence in omitting something which did not occur to the board as necessary to prevent injury to the public.

While the learned Chief Justice did not expressly tell the jury that the omission to put up the notice was an act of negligence, the jury were warranted in inferring from his mentioning it as one of the three matters of negligence complained of by the plaintiff which they might find that it did constitute negligence.

The judgment must be set aside, but it remains to be considered whether there should be a new trial or judgment for the defendants.

The answer depends upon whether, expressly finding the negligence to have been one of the three acts mentioned to them by the learned Chief Justice, the jury must be considered as having negatived the other two alleged acts.

I do not think, in the circumstances of this case, any such inference can be properly drawn. The learned Chief Justice, in effect, told the jury that it was unnecessary for them to find more than one of the three acts of alleged negligence. No intimation was given that, if they omitted to expressly find in favour of the plaintiff on any one of them, their omission would be taken as a finding in favour of the defendants on that charge, or that it was their duty to adjudicate upon each of them; so, having by the answer to the first question found the defendants guilty of negligence which caused the plaintiff's injury, and having been, in effect, told that the failure to put up the notice was an act of negligence, they might reasonably consider it was unnecessary for them to do more than the least their instructions indicated, and thus avoid the responsibility of passing upon the conflicting evidence between the plaintiff and the defendant as to the other charges of negligence.

The case is distinguishable from *Andreas v. Canadian Pacific R.W. Co.* (1905), 37 S.C.R. 1, where, instead of the jury being told that they might find one of two charges of negligence, they were specifically asked by the trial Judge to find in regard to the ringing of the bell and the blowing of the whistle. They did not expressly find upon these matters, but found that the defendants failed to reduce the speed of the train as required by the Railway Act.

The learned Chief Justice, at p. 10, after citing an extract from the charge, says: "Now, the jury, with such clear and direct instructions on the point, having answered that the cause of the accident was the failure to reduce the speed, under sec. 259 of the Act, must be considered as having negatived all the other charges of negligence."

This case does not establish, nor is there any general rule, that "all negligence is negatived which is not expressly found," but each case must depend upon its own circumstances.

In *Cobban v. Canadian Pacific R.W. Co.* (1894), 26 O.R. 732, and 26 A.R. 115, it was held that where the jury find negligence and then define the negligence to consist in doing certain acts, the Court, if there is some evidence of negligence in other respects, may, in their discretion, order a new trial, although there is no evidence to support the specific findings.

In *Hanly v. Michigan Central R.W. Co.* (1907), 13 O.L.R. 560, Osler, J.A., at p. 564, says: "The evidence of failure to give either of the statutory warnings was conflicting, and the weight of evidence is against the plaintiff's contention on that point—a fact which quite accounts for the omission of the jury to answer the question by which their attention was specially directed to it as the ground of negligence prominently put forward and mainly relied upon at the trial. If we could see that the consideration of this had been merely overlooked by the jury, we might think it right to direct a new trial, as was done in the case of *Cobban v. Canadian Pacific R.W. Co.*," *supra*.

In *Hinsley v. London Street R.W. Co.* (1908), 16 O.L.R. 350, at p. 353, the same learned Judge says: "Another act of negligence in reference to the management of the fender of the car was, however, also relied upon, but the jury were told that they need not consider this if they found for the plaintiff on the other grounds, which we now hold not to be tenable, and it was accordingly not passed upon by them. I cannot say that there was not some evidence of negligence in this respect, and therefore there must be a new trial."

Russell v. Bell Telephone Co. (1908), 11 O.W.R. 808, is another

case in which a Divisional Court exercised the discretion of granting a new trial after the jury had failed to answer specifically upon two charges of negligence, but found in favour of the plaintiff upon another charge of negligence, which the trial Judge ruled was not supported by the evidence.

I think, both upon authority and upon principle, that, in view of the fact that in this case there is evidence upon which, if believed, the jury could have found negligence against the defendants, and of the circumstances already alluded to, the appeal should be allowed, the judgment set aside, and a new trial granted without costs of the former trial or of the appeal.

MEREDITH, C.J., and MACMAHON, J., concurred.

From this judgment the defendants appealed to the Court of Appeal.

On November 18, 1908, the appeal was heard before Moss, C.J.O., OSLER, GARROW, MACLAREN and MEREDITH, J.J.A.

H. H. Dewart, K.C., for the appellants. The Divisional Court improperly directed a new trial. The fact of the jury finding on only one of the grounds of negligence submitted to them must be taken as negating any negligence on the other alleged grounds: *Andreas v. Canadian Pacific R.W. Co.*, 37 S.C.R. 1; *Hanly v. Michigan Central R.W. Co.*, 13 O.L.R. 560; *Cooledge v. Toronto R.W. Co.* (1907), 10 O.W.R. 739. The ground on which the jury did find, and which was the proximate cause of the injury, did not amount to negligence on the defendants' part. The defendants were acting in accordance with the order of the Railway and Municipal Board, under sec. 16 of the Ontario Railway and Municipal Board Act, 1906, 6 Edw. VII. ch. 31. The order did not require any notice to be given. The accident, however, was caused by the plaintiff's own negligence in attempting to board the car by the front vestibule, when she knew the door was closed, without having first called the motorman's attention to the fact that she desired to enter that way.

J. M. Godfrey, for the respondents. The omission of a non-admittance notice was evidence of negligence to go to the jury.

The order of the Railway Board did not relieve the defendants from exercising reasonable care in the management of their railway. The public were accustomed to enter by the front door. The defendants were bound to know that some time would elapse before the public would be aware of the existence of the order, and it was their duty, therefore, to notify the public of the change made. The jury assumed, from the Chief Justice's charge, that it was only necessary for them to find on one ground of negligence. Their attention should have been called to the fact that they could find on one or all of the grounds. If, therefore, there is any doubt as to the ground on which the jury did find constituting negligence, the plaintiff is entitled to have the case again submitted to them: *Cobban v. Canadian Pacific R.W. Co.*, 23 A.R. 115; *Hanly v. Michigan Central R.W. Co.*, 13 O.L.R. 567. There was a duty imposed on those in charge of the car to see that intending passengers were safely on the car before they attempted to start it. *Cobban v. Canadian Pacific R.W. Co.* is clearly in favour of the plaintiff. The point relied on by the defendants was only the opinion of one of the Judges. The Divisional Court, therefore, exercised a proper discretion in granting a new trial: *Russell v. Bell Telephone Co.*, 11 O.W.R. 808. There was no contributory negligence on the plaintiff's part. The evidence is clear that when the plaintiff got on the front step she rapped on the window and the motorman turned towards her and saw her, beckoning towards the rear of the car, and notwithstanding he saw her remaining on the step he started the car and she was thrown off and injured. In any event this was a question for the jury.

H. H. Dewart, in reply. The plaintiff cannot insist on notice, as she knew of the change that had been made. The motorman never saw the plaintiff, and the jury have substantially so found. There was no suggestion at the trial as to the starting of the car before the passengers were safely on. The plaintiff, if she desired a finding on other grounds, should have asked for a finding on them. As to the defendants asking for a new trial, this was only asked for in the alternative. They have a right to have the case decided as it stood on the finding of the jury.

December 3, 1908. OSLER, J.A.:—I am unable to agree with the judgment of the Divisional Court. Three grounds of negligence were put forward at the trial, viz.: (1) That there was no notice on the front door of the car by which the plaintiff was attempting to enter, that that door was closed against passengers, and that they were to enter at the rear door; (2) that the defendants' motorman carelessly started the car or started it with a jolt while the plaintiff was on the front step attempting to get in; and (3) that the motorman did not open the door to let her in, though he saw her standing on the step.

The first and second grounds were charged in the statement of claim; the third was not. As to the fact of the absence of notice on the front door, there was no contest. The defendants had closed the front doors of their cars to passengers for the purpose of entrance by the authority and order of the Railway and Municipal Board, and had complied with all the terms of the order, and the contention was that it was, nevertheless, negligence to omit to warn passengers by a "no admittance" notice, or something of that kind, not to attempt to enter by the front door, although it was closed in fact and there was no outside handle on it.

The other grounds of negligence were the main subject of dispute, and as to both of them there was considerable conflict of testimony, which was dealt with at length in the charge of the learned trial Judge, who, after fully analyzing and explaining it, finally told the jury, "the plaintiff charges that there were three different matters of negligence, any one of which you may find or all of them," and he then stated them in detail as above. The jury found that the injuries which the plaintiff sustained were caused by the negligence of the defendants; that such negligence consisted in the absence of a "no admittance" notice on outside the door; that the plaintiff's injuries were not caused by any negligence on her part, and that she could not by the exercise of reasonable care have avoided the accident. The plaintiff did not request that the jury should be asked to reconsider their findings or express themselves further as to the other

grounds of negligence, and the learned Judge directed judgment for the plaintiff for the damages assessed.

The defendants moved against the judgment, contending that the omission of the notice was not an act of neglect on their part, as they had complied with the order of the Railway and Municipal Board in doing what they did, and that there was nothing in the appearance of the door or otherwise which could be regarded as an invitation to anyone to enter by it. The Divisional Court agreed with this contention, but directed a new trial in order that the other grounds of negligence, upon which there had been no express finding, might be dealt with.

In my opinion, this case is not fairly distinguishable from the cases of *Hanly v. Michigan Central R.W. Co.*, 13 O.L.R. 560, or *Andreas v. Canadian Pacific R.W. Co.*, 37 S.C.R. 1. There was no misdirection. The plaintiff's case, as regards all the grounds on which it was sought to fasten liability on the defendants, was fully explained to the jury. Nothing was withdrawn from them. They were expressly told that they might find any one or all of the grounds of negligence charged, and on such a charge, where a jury, in answer to the question whether the plaintiff's injury was sustained by any negligence of the defendants, answer "yes," and then find that such negligence was one out of several grounds put forward and submitted for their consideration, I think that, in fairness to the defendants, it ought as a general rule to be held that the jury has negatived the other grounds, and, in the conflict of testimony, has considered them as not proved. Every case must depend on its own circumstances, and where it can be seen that the jury has not properly considered the evidence, or has travelled out of the record to find something not charged or relied upon, or where the findings as to negligence are confused or inappropriate (which may have been the ground on which the case of *Russell v. Bell Telephone Co.*, 11 O.W.R. 808, proceeded), or when some particular act of negligence has been withdrawn from them absolutely or contingently upon their finding some other act proved (*Hinsley v. London Street R.W. Co.*, 16 O.L.R. 350), there is little

difficulty in directing a new trial, where there is evidence of other acts of negligence.

But in a case like the present, when there has been no miscarriage of any kind, something more ought to appear to justify a new trial than merely the fact that the jury has not expressly found with reference to each act of negligence. Otherwise every such act may become the subject of a separate trial, and a new trial, instead of being a means of correcting a miscarriage of justice, will become an engine of oppression by protracting litigation and increasing costs. And see *Lloyd v. Woolland Brothers* (1902), 19 Times L.R. 32.

I agree with the Divisional Court that the not putting a notice on the door was not a negligent omission in the circumstances. No duty to do so was imposed by the order of the Railway Board, and the closed door itself, with the absence of any means for opening it from the outside, was, as Teetzel, J., speaking for the Court, says, ample notice to the public that the door was not intended for ingress.

On the whole, I am of opinion that the appeal should be allowed and the action dismissed.

GARROW, J.A.:—Appeal by the defendants from the judgment of a Divisional Court setting aside the judgment at the trial before Falconbridge, C.J., and a jury, in favour of the plaintiff, and directing a new trial.

The action was brought to recover damages sustained by the plaintiff in being thrown from a street car operated by the defendants, owing, as was alleged, to the negligence of the defendants.

On December 1st, 1907, the plaintiff, desiring to enter as a passenger the car in question, attempted to enter by the front door, which was closed, and could not be opened from the outside, instead of by the rear door, which was open, and was at the time the proper door by which to enter, and, while standing on the step, the car started, and she was thrown or fell to the ground and was injured. The door by which the plaintiff attempted to enter was kept closed under an order of the Ontario

Railway and Municipal Board, dated May 17th, 1907, requiring the front doors of all cars to be so closed during the winter months for the protection of the motorman ; the order to come into effect on November 1st, 1907.

There was no door knob on the outside, and it could only be opened from the inside, the intention being that it should only be opened to permit passengers to leave the car, but not to enter.

The allegations of negligence in the statement of claim were: (1) No notice had been put up that the door was closed; (2) the motorman knew the plaintiff was on the step and yet started the car.

The jury found (1) the injuries to plaintiff were caused by the defendant's negligence, (2) such negligence consisting in "no admittance notice on outside of door," (3) no contributory negligence, and (4) damages \$750.

In the charge to the jury the learned Chief Justice said that there were three grounds of negligence relied on, any one of which or all of which they might find, namely: "First, in that there was no notice on the door that the door was closed for entrance; second, in starting the car, if you find it to be the case, when she was already on the step; and thirdly, in not opening the door to let her in." The absence of the notice was not disputed. There was a direct conflict upon the question whether or not the motorman saw the plaintiff on the step, the plaintiff alleging that he did and the motorman denying the fact.

And this conflict, the only one in the case, comprised the chief feature of the very full and careful charge, early in which the learned Chief Justice said: "The evidence in this case, as in the one tried yesterday, is pretty short and pointed, and it comes down to the broad proposition of which witnesses you choose to believe." The Divisional Court held that the failure to put up a notice of non-admittance was not, under the circumstances, negligence, but granted a new trial upon the ground that the jury might have been misled by the charge into believing that it was only necessary to pass upon one of the three grounds of negligence relied on. And reference was made to *Andreas v.*

Canadian Pacific R.W. Co., 37 S.C.R. 1, which was distinguished, and to *Cobban v. Canadian Pacific R.W. Co.*, 26 A.R. 115; *Hanly v. Michigan Central R.W. Co.*, 13 O.L.R. 566; *Hinsley v. London Street R.W. Co.*, 16 O.L.R. 350, and *Russell v. Bell Telephone Co.*, 11 O.W.R. 808.

I agree with the Divisional Court that it was not, under the circumstances, negligence nor evidence of negligence not to post up a notice of non-admittance. The closed door and the absence of a knob or other outside means of opening it ought to have been sufficient, especially to one accustomed, as the plaintiff was, to the daily use of the street cars, and who admits that she knew of such doors having been put up, to repel any question of invitation. And upon this ground the action should have been dismissed at the trial. And I am, with deference, of the opinion that no sufficient ground is shewn for granting a new trial.

It is the rule, and a wise and sensible one, that when a jury is told that they may find any one or more of several heads of negligence upon the evidence, and they find only one, the others are by necessary implication to be taken as found in favour of the other side, or negatived. To this rule, as to other rules, there are, doubtless, exceptions, but the rule itself is clear, and was not laid down for the first time by any means in *Andreas v. Canadian Pacific R.W. Co.*, 37 S.C.R. 1. See, in addition to the other cases before referred to, *Lloyd v. Woolland Brothers*, 19 Times L. R. 32 (C.A.).

Nothing was withdrawn or withheld from the jury, as was the case in *Russell v. Bell Telephone Co.* and *Hinsley v. London Street R.W. Co.* The jury was plainly invited to find all or any of the several grounds on which the plaintiff relied. No one suggests that all the evidence which could be given was not given; no objection to the charge was made on either side, and none could, I think, properly have been made. The conflict of testimony between the plaintiff and the motorman was very clearly and very fully pointed out, and the jury told that, in so far as that conflict was concerned, it was purely a question of credi-

bility, and no reason appears to justify the assumption that this, the main burden of the whole charge, was wholly ignored by the jury in favour of the other and simpler finding of a fact which was never for a moment in dispute.

Why should it not be assumed, knowing as we all do the proneness of juries to favour the plaintiff in such an action, that the failure to answer the second and third questions in favour of this plaintiff was not because of any oversight on their part, or because they were in any way misled by the charge, but because of the weakness of the plaintiff's case, which rested wholly on her own testimony. In such cases it is, of course, quite permissible to examine the whole evidence for the purpose of seeing if injustice would be done by applying the rule. This was done in *Cobban v. Canadian Pacific R.W. Co.* and in some of the other cases before referred to, and if in such examination it appears that there is strong evidence of negligence upon the heads of negligence not passed upon by the jury, a new trial might well be granted as a matter of discretion. But that is not this case. Here, as in the case of *Hanley v. Michigan Central R.W. Co.*, the evidence is not merely conflicting, but very weak, for how can any one be certain that, at seven o'clock of a December night, another person, with practically only a moment's opportunity, saw him or her through a glass door, as the plaintiff was, and it all depends upon that. A new trial was refused in that case, as I think it should have been in this, and for similar reasons.

I would allow the appeal and dismiss the action with costs throughout to the defendants, if they ask for them.

MEREDITH, J.A.:—The general rule that a verdict once found ought to stand is not one which is applicable only to a verdict for the plaintiff, nor to a verdict against a corporation; it is one which ought to be applied impartially, and it is one which seems to me entirely applicable to this case.

After a very full trial, and after a very comprehensive charge, the case went to the jury without any sort of objection from anyone, in any respect. No one then thought that there was any

misdirection, or want of proper direction, or any ambiguity, or doubt, in, or arising out of, the charge in any respect; and in that I cannot but think everyone was then right.

If there had been any misdirection, or want of proper direction, that would not entitle the plaintiff to a new trial, because no objection was made at the proper time, and when, if made, it might have been corrected; so that a new trial, as of right, is out of the question.

This Court may, of course, notwithstanding such want of objection, grant a new trial, but that is, and must in the interests of the proper administration of justice and having regard to the respective functions of Court and jury, be a rare occurrence, based upon some plain miscarriage, or probable miscarriage, in some essential respect.

There was, in my opinion, nothing of that character in this case, nor, indeed, any ground for granting a new trial, even if objection had been duly taken to the charge.

Each act of alleged negligence relied upon by the plaintiff was clearly and fully left to the jury, and there was nothing like a suggestion that if they found against the defendants in respect of any one of them they need not find as to the others; if there had been, objection to the charge would immediately have been made. Any such ground of complaint is merely an afterthought, which requires perversion of the fact, and a stultification of those having the conduct of the plaintiff's case throughout, to give it any sort of a foundation. Not only did the learned trial Judge set forth—clearly set forth—the three grounds upon which the plaintiff's claim was rested, but he also, in the plainest words, told the jury that any one or all of them they might find in the plaintiff's favour.

In most of such cases as this the plaintiff's contention is based upon the obviously fallacious ground that the jury must "negative" all acts of negligence relied upon by him except that which they have found in his favour. Their duty is to find only the proximate cause of the injury; all other acts of negligence, no matter how plain or how gross, are immaterial, and therefore

subjects with which the jury, in their verdict, are not concerned. It was not necessary, and it would have been improper, for the jury to have found upon any question of negligence which they found was not the proximate cause of the injury. Having found that the proximate cause of the injury was the want of the notice, other causes, if any, not proximate, were immaterial.

To have told the jury that, if they found the proximate cause of the injury to have been but one of the three grounds of negligence alleged, they had better add another for fear that one might not hold water, could hardly have been right; and yet that is really what, in many of these cases, is desired, and that towards which, in some charges, there seems to be in these days a drifting.

Looking for anything like a miscarriage of justice in this case, one meets with the opposite of that. The charge of the learned Judge and the findings of the jury seem to me unexceptionable. To have found for the plaintiff on any of the other grounds would have been to have found against the weight of the evidence and contrary to that learned Judge's firm views.

That the want of the notice was not actionable negligence I have no sort of doubt. The closing of the door as a means of ingress was not the act of the defendants; it was done under compulsion of the law, and the blame, if any in law, for the absence of a notice is attributable to those who compelled the closing of the door without requiring the notice. The defendants fully complied with their order.

I would allow the appeal.

MOSS, C.J.O. and MACLAREN, J.A., concurred.

NEGLIGENCE—EXCESSIVE DAMAGES.

ONTARIO.]

[COURT OF APPEAL.

MORIN v. OTTAWA ELECTRIC R.W. Co.

(18 O.L.R. 209.)

Damages—Negligence—Injury—Impairment of Prospects of Marriage—Remoteness—Excessive Damages.

In an action for negligence, impairment of the prospects of matrimony, in the case of a young woman, by reason of physical injuries, may be taken into consideration by the jury in estimating the damages.

In such a case of accident to a young woman of about 21 years of age, living with her father, but earning \$6 a week as a stenographer, which accident resulted in the amputation of her left leg at the knee, paresis in a hand and arm, of which there might never be complete recovery, injury to her back, and a very serious shock to her nervous system:—

Held, that a verdict of \$5,500 damages was not so excessive as to necessitate a new trial.

THIS was an appeal by the defendants from the judgment of Meredith, C.J.C.P., at the trial of this action before him and a jury at Ottawa, on October 6th, 1908, which trial resulted in a verdict in favour of the plaintiff Lena Morin for \$5,500 and of the plaintiff Oliver Morin, her father, for \$233.

The action was brought by the plaintiffs for damages in respect to an accident caused, as alleged by them, by the negligence of the defendants, resulting in a collision between a car of the defendants, in which the plaintiff Lena Morin was a passenger, and another car of the defendants.

The appeal was on the ground that the amount of damages awarded to the plaintiff Lena Morin was excessive and unreasonable, and on the ground that the learned trial Judge misdirected the jury in charging them that they might take into consideration, in assessing the damages, the fact that the prospects of matrimony of the said Lena Morin were affected by reason of her injuries.

The appeal was argued on February 4th, 1909, before Moss, C.J.O., and OSLER, GARROW and MACLAREN, JJ.A.

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I. F. Hellmuth, K.C., for the appellants, contended that the damages were excessive, and that especially the prospects of marriage should not have been considered, and referred to *Smith v. Pittsburg R.W. Co.* (1898), 90 Fed. 783; *Johnston v. Great Western R.W. Co.*, [1904] 2 K.B. 250; *Cray v. Wabash and Grand Trunk R.W. Co's.* (1908), 13 O.W.R. 141.

A. E. Fripp, K.C., for the respondents, contended that there was nothing to warrant the Court in concluding that the jury had gone astray in their verdict.

April 5, 1909. Moss, C.J.O.:—At the trial the defendants abandoned their defences to the plaintiffs' allegations of negligence, and the sole question submitted to the jury was as to the damages proper to be awarded to the plaintiffs respectively.

The plaintiff Oliver Morin was allowed \$233, and this is not objected to. The plaintiff Lena Morin, who was injured by reason of the negligent conduct of those in charge of one of the defendants' cars, in which she was riding, was allowed \$5,500.

The defendants complain of the amount as excessive, and ask for a new trial on that account. They also complain of misdirection, but, on the argument of the appeal, this ground did not appear to be urged with much confidence.

The objection is that the learned trial Judge, when specifying the heads of damage which the jury might consider and take into account in estimating the compensation which the plaintiff Lena Morin might receive, included amongst them the effect, if any, on her prospects of matrimony of the injuries which she had received. The learned Judge did not press the point very strongly. What he said was: "I suppose all women have a hope of marriage: how far will it interfere with her prospects of being settled in life and how far can you fairly measure that in money?" And he added, dealing apparently not only with this, but with all the other heads he had been previously alluding to: "It is a very difficult thing for anyone to estimate, and all you can do is to bring your sound judgment fairly to the consideration of these matters."

At the time of the accident the plaintiff Lena Morin was between 20 and 21 years of age, living with her father, but earning her own livelihood, working as a stenographer at a salary of \$6 per week. She had been engaged in this occupation for over three years. From her injuries resulted the amputation of her left leg at the knee, the loss of control of, or a form of paresis in a hand and arm—from which according to the medical testimony there may never be an entirely satisfactory recovery—and a very serious shock to her nervous system.

Manifestly, the burden of these tends to affect more or less permanently the health and constitutional powers of the individual, and the jury had an opportunity of observing the plaintiff while she was giving her testimony, and of forming some judgment as to her physical condition. From what they saw and heard, they could draw their own conclusions as to whether the results of her injuries were or were not likely to impair her prospects of a suitable marriage and settlement in life, with the accompanying freedom from self-dependence.

A jury may properly take into consideration any damages that are the natural and necessary result of the act complained of, and it would not be improper to draw the attention of the jury in this case to what was, in all probability, in the minds of all, the possibly injurious effect of the accident upon her prospects of entering into the marital relation.

There does not appear to be any case or opinion unfavourable to this view in our own or the English courts, while, on the other hand, the views of courts in the United States, so far as expressed, are favourable. There is nothing in what the learned trial Judge said that would be likely to unfairly influence the jury in considering the question of damages, and a new trial ought not to be granted on the ground of misdirection.

As to the damages being excessive, it must be confessed that they seem liberal. But they are the jury's estimate, and it is to be borne in mind that the plaintiff has not only been greatly crippled in the use of her major limbs, but she was subjected to the pain and suffering incident to these and the other injuries

she sustained, and has been permanently it may be—though the medical witness hopes not—incapacitated from pursuing her occupation and means of livelihood.

The learned trial Judge fully laid before the jury all the elements of damage which they should consider and take into account. He cautioned them against giving to the plaintiff such a sum as would really amount to a punitive award rather than a fair compensation, and warned them of the impropriety of giving an amount that would secure her an annuity equal to or nearly approaching what she could have earned if she had not been injured, and finally told them that they were not to give her anything on account of sympathy, "and do not especially give her anything because you think this railway company ought not to have allowed the accident to happen, and because you want to punish them and teach them to be more careful in the future, because that is not your function."

In this, as in every other branch of the charge, the learned trial Judge directed the jury fairly and reasonably, and with a due regard to the defendants' rights, and there is no reason to suppose that the jury misunderstood him in any respect. There is nothing in the circumstances to fairly give rise to the inference that the jury have taken into account matters which they should not have considered, and their award should not be interfered with.

The appeal should be dismissed.

OSLER, J.A.:—This is an appeal by the defendants from the judgment at the trial in favour of the plaintiff Lena Morin upon a verdict for \$5,500, which is complained of as being unreasonable and excessive. Incidentally and as probably having led the jury to give larger damages than they might otherwise have given, the charge of the learned trial Judge is in one particular objected to.

Apart from this objection, which I will presently mention, the charge was not complained of, nor do I see that it was open to objection or that it can be said that it was likely to mislead the jury or to induce them to deal with the damages otherwise

than they were at liberty, upon the evidence, to deal with them in a case of this kind.

The plaintiff is a young woman of 20 or 21 years of age, and she sustained, in a collision on the defendants' railway, injuries of a very grievous and painful character, in the loss of a leg, severe and possibly prolonged impairment of the use of her working hand, injury to her back, bruises on the face and shock of her whole system. The learned Judge, after referring to some of the usual elements of damage, added: "Then she is a woman; how is it going to interfere with her prospects of matrimony? I suppose all women have a hope of being settled in life, and how far can you fairly estimate that in money? It is a very difficult thing for anyone to estimate, and all you can do is to bring your sound judgment to the consideration of these matters." It was objected that the jury should not have been told "that they might consider the element of matrimony."

As to the objection to the charge, I deal with this, just as it was presented, only as a question of law—namely, whether impairment of the prospects of matrimony, in the case of a young woman, by reason of physical injuries, is too remote to form one of the elements of damage. No case was cited to us from the English courts or our own, on the subject, nor have I succeeded in finding one there on the exact point. I think it would strike most people that the natural and probable consequences of such injuries would be to lessen a girl's chances of matrimony, and in *The Oriflamme* (1875), 3 Sawyer 397, Judge Deady makes an apt observation on the subject, at p. 404: "In this country at least it is still open to every woman, however poor or humble, to obtain a secure and independent position in the community by marriage. In that matter, which is said to be the chief end of her existence, personal appearance—comeliness—is a consideration of comparative importance in the case of every daughter of Eve."

In *Berry v. Da Costa* (1866), L.R. 1 C.P. 331, an action for breach of promise of marriage, where the plaintiff, while engaged, had been seduced by the defendant, a direction to the effect that

the plaintiff was entitled to be compensated not only for the loss she had sustained in not becoming the wife of the defendant, but also for the aggravation of that loss by reason of the prospects of marrying another being materially lessened, was upheld by a strong Court. In *Smith v. The Pittsburg R.W. Co.*, 90 Fed. Rep. 783, it was said by the Court that "an injury to the person of a woman affecting her prospects of marriage should be as actionable as one to her character."

That was an action similar to the one before us, and loss of the prospects of matrimony was treated as one of the natural consequences of the injury the plaintiff had suffered. The case is referred to in several of the American text-books on the subject, but it is sufficient to cite Watson on Damages for Personal Injuries (1901), sec. 469; Sutherland on Damages, 3rd ed. (1903), vol. 1, sec. 93. The present case is not complicated by any questions of pleading or evidence, as in *Hunter v. Stewart* (1859), 47 Maine 419, and the objection to the charge, as taken, in my opinion, fails.

As to the amount of the verdict, it is, no doubt, very large—larger than I would have been disposed to give had I been trying the case—but, taking everything into consideration, I am quite unable to say that it indicates any gross error, misconception or improper motives on the part of the jury. I am therefore of opinion that we should not interfere. The appeal should be dismissed with costs.

GARROW, J.A., and MACLAREN, J.A., concurred.

CATTLE AT LARGE.

ONTARIO.]

[RIDDELL, J.

SEXTON V. GRAND TRUNK R.W. CO.

(18 O.L.R. 202.)

*Railways—Cattle at Large—Competent Person—Boy of Ten—Judgment—
R.S.C. 1906, ch. 37, sec. 294.*

Section 294 of the Railway Act, R.S.C. 1906, ch. 37, enacts that "no horses . . . or other cattle shall be permitted to be at large upon any highway within half a mile of (its) intersection with any railway at rail level, unless . . . in charge of some competent person . . . to prevent their loitering . . . on such highway . . . or straying upon the railway.

"(3) If the horses . . . of any person which are at large contrary to . . . this section are killed . . . by any train at such point of intersection . . . he shall not have any right of action against any company in respect of the same being killed or injured."

The plaintiff, a farmer, sent a lad about ten years old to take fourteen cows along a public highway and across the defendants' line of railway. A train of the defendants ran over and killed four of the cows, and the jury found negligence on the part of the defendants, and also that the boy was a "competent person" within the meaning of the above section:—

Held, that the plaintiff was entitled to judgment.

THIS was an action tried before RIDDELL, J., and a jury at Toronto, on February 8th, 1909, for damages under the circumstances mentioned in the judgment, in which the facts are stated and the statutes and cases cited are referred to.

J. M. Godfrey, for the plaintiff.

W. E. Foster, for the defendants.

February 18, 1909. RIDDELL, J.:—This is a case tried before me, with a jury, at the Toronto assizes. The facts are very simple.

The plaintiff, who is a farmer residing in the township of Scarborough, on July 25th last, about the time that the morning train going east was expected, sent his son, a lad of some ten years of age, to take 14 cows along a public highway, across the line of railway, to a field south of the track. The train came along and killed four of the cows, the train travelling at the usual speed and at the usual time.

Four questions were submitted to the jury, which questions I here set out, with the answers:—

(1) Were the cows killed through the negligence of anyone?
A. Yes.

(2) If so, what was the negligence? Answer fully. A. In not blowing whistle and ringing the bell at the proper time. We also believe the engineer could have stopped his train in time to have avoided the accident.

(3) Damages, if any. A. Two hundred dollars.

(4) Was the lad a "competent person?" A. Yes.

A motion for nonsuit had been made at the close of the plaintiff's case and reserved. This motion was again made at the close of the whole case and again reserved. I now proceed to dispose of the case.

There was evidence upon which the jury might find that the accident was caused by the neglect of the defendants' servants to give the statutory signals, but none to justify the second alleged act of negligence—there was no evidence upon which the jury could find that the engineer could have stopped the train after seeing the cows. This is immaterial, however, as there is quite sufficient in the first finding of negligence to support a verdict for the plaintiff, if he is otherwise entitled to such verdict. Under the practice, I have nothing to do with the weight of evidence.

The damages are such as are justified by the evidence at least under my charge, permitting, as I did, the jury to give such damages as they thought fair for loss of profits which would take place before the plaintiff could replace his cows—the cows that were killed were milch cows, the milk from which the plaintiff was selling.

The whole question I have now to determine is whether I should have granted a nonsuit, and whether, notwithstanding the finding of the jury in answer to the last question, the defendants are not entitled to a nonsuit, or, more correctly speaking, to a verdict.

The argument for the defendants is based upon R.S.C. 1906, ch. 37, sec. 294 and sec. 294 (3): "No horses, sheep, swine or other cattle shall be permitted to be at large upon any highway, within half a mile of the intersection of such highway with any

railway at rail level, unless they are in charge of some competent person or persons, to prevent their loitering or stopping on such highway at such intersection, or straying upon the railway. . . .

(3) If the horses, sheep, swine or other cattle of any person which are at large contrary to the provisions of this section are killed or injured by any train at such point of intersection, he shall not have any right of action against any company in respect of the same being killed or injured."

The express words of the statute, as well as the history of the legislation and decisions, make it abundantly clear that the bare fact of the cattle being at large without being in charge of some competent person as required by the statute would deprive the owner of all right to recover, even though the accident was caused by the negligence of the railway; the legislation was introduced for the safety of the public and not simply for the advantage of the railway company.

It is argued that the decisions are such that I must hold as a matter of law that the lad here was not a "competent" person within the Act; and Mr. Foster, in the very careful and comprehensive argument put in, cites a number of authorities which he contends put this beyond dispute. I am not able to agree with this contention.

The first of the statutes was that of 1857, 20 Vict. ch. 12, sec. 16: "No horses, sheep or swine or other cattle shall be permitted to be at large upon any highway within a half-mile of the intersection of any highway with any railway on grade unless the same respectively shall be in charge of some person or persons to prevent their loitering or stopping on such highway at such intersection with any railway and no person, any of whose cattle so at large shall be killed by any train at such point of intersection, shall have any cause of action against any railway company in respect of the same being so killed."

Under this statute was decided *Simpson v. Great Western R.W. Co.* (1858), 17 U.C.R. 57. There a horse had escaped to the road, and, through defects in the cattle guards, had got upon the line of railway and had been killed when not at

the point of intersection. It was held that it was the duty of the owner to prevent a horse from getting so at large, and his position was not improved by the fact that the horse had escaped and was at large without the knowledge or permission of his owner. The previous case of *Ferris v. Grand Trunk R.W. Co.* (1857), 16 U.C.R. 474, is not in point.

In *Thompson v. Grand Trunk R.W. Co.* (1859), 18 U.C.R. 92, the plaintiff's boy, a lad of 14, was driving four of the plaintiff's horses along the highway, about dusk, intending to put them in a field, the gate of which opened into the road about 60 yards from the crossing. While he was opening the gate, the horses, being loose, passed on to the track, and three of them were killed by a train which was passing at its usual time. The Court held that there could be no recovery.

The horses were not haltered, but were driven loosely, and the Court held that "he had none of them in charge, any more than that he intentionally drove them out upon the road, meaning that they should stop at the gate, but taking no means to insure their doing so. All that can be said is that he knew where they were and might have seen, if there had been light enough; but that, as the event proved, afforded no security against their straying upon the railway track." It will be seen that the Court held the very fact that the boy did not keep the horses off the track, though he tried to do so, proved that the statute had not been complied with. This case is no authority for the proposition that a boy of fourteen or of ten years of age is not quite competent to take charge of cows. The second of the grounds upon which the judgment is put, namely, that the plaintiff was guilty of contributory negligence in sending his horses in charge of a boy, without bridle or means of control, after dark, has likewise no application to the present case. It is usual to have horses haltered, but not cows.

In the same volume is found the case of *Cooley v. Grand Trunk R.W. Co.* (1859), 18 U.C.R. 96. There the plaintiff sent three of his horses to a watering place upon the highway, with his servant, who merely drove the horses before him,

not having any further means of control—bridle, halter or otherwise. They passed the watering place and got on to the railway over the cattle guard, which was filled with snow, and were killed. The Court held that “the plaintiff’s horse was unlawfully upon the highway, having, by the negligence of its owner, been allowed to escape into the highway within half a mile of a railway crossing, from whence it got upon the railway at the point of intersection.” In this case, also, the facts shewed that the horses were not under control.

Then came the consolidation in 1859, the C.S.C., ch. 66, secs. 147 and 149 of which contained the provisions which I have set out, almost *totidem verbis*. This being in force, came on for decision the case of *M’Gee v. Great Western R.W. Co.* (1864), 23 U.C.R. 293. This was a decision on a demurrer, and is not helpful on the matter now under discussion.

The next case to be mentioned is *Markham v. Great Western R.W. Co.* (1866), 25 U.C.R. 572. There the plaintiff’s son, as it was getting dark, was taking three horses along a highway which crossed the line of rail, riding one, leading another and driving the third. This third horse, being some 60 to 100 feet in front, attempted to cross the track as a train approached, and was killed. It was held that this horse was not in charge of any one within the meaning of the statute, and that the plaintiff, consequently, could not recover. The Chief Justice (Draper) says, speaking of the previous decisions: “The result of these decisions I take to be that horses which are driven near or across the railway loose, without halter, bridle or other similar fastening, and therefore under no actual present check or holdfast, and are not so close to their driver as to be under his immediate manual control and restraint, are not ‘in charge’ within the spirit and meaning of sec. 147 of the Railway Act.” I do not find that the cases go quite the length stated by the learned Chief Justice; but, in any event, he is speaking of horses, and not of cows. Hagarty, J., says (p. 574): “We are unable to see how the horse, driven from 60 to 100 feet in front of the others, which, doubtless, were duly

'in charge,' can be said to have been properly under the man's control. The event shewed his utter inability to prevent the animal running on or across the track. Common sense would suggest that in the dusk of the evening a train, rushing rapidly past the point that the witness was approaching, would startle the horse so driven, and render him quite unmanageable." That very able Judge, however, goes on to say: "If animals usually driven—viz., oxen, pigs or sheep—have to approach or cross a railway, we should naturally consider them as 'in charge' when the person or persons driving them could readily head them off or turn them, if necessary, from the track."

The new Act of 1888, 51 Vict. ch. 29, sec. 271 (D.), contains, in sub-secs. (1) and (3), the same provisions. Under that statute *Thompson v. Grand Trunk R.W. Co.* (1895), 22 A.R. 453, was decided. The case of *Duncan v. Canadian Pacific R.W. Co.* (1891), 21 O.R. 355, does not seem to be in point. The *Thompson* case is much relied upon by the defendants here. Mr. Justice Osler, in giving the judgment of the Court, sitting in appeal in a county court case, says: "I cannot see that, under the circumstances, the fact that the animals were cows and not horses, as in the above case, makes any difference." But my learned brother is not saying that there is no difference in cows and horses in respect of the proper manner of handling and managing them. He goes on to say: "The point is, that they were left unattended."

In that case the plaintiff's boy was ordered to drive seven cows and a heifer from one part of the plaintiff's farm across the highway to another part thereof, through two gates, nearly opposite to one another, one on each side of the road. The railway crossed the highway on a level about 300 yards south of the gates. Both gates having been first opened, the cattle were driven on the road. The heifer, separating from the cows, ran along on the road north; the boy left the cows, and ran after the heifer, and overtook and turned it and drove it back after it had run about 100 yards. In the meantime the other cattle had started down the road toward the railway, and got within about 100 yards

of it by the time the boy had turned the heifer. The heifer continued to follow on past the gate after the cows, and started them all on a run towards the railway. They reached the track, and remained standing on it before the boy could get near enough to drive them across it; the train ran into them, killing two. Mr. Justice Osler, giving the judgment of the Court, says (p. 460): "The boy left some of the cattle standing on the road while he went to recover the one which had run off in a direction where no danger was to be anticipated. How can he be said to have been in charge of the others, within the meaning of the Act? He had got so far away from them that it was impossible for him to prevent them from reaching the track and loitering upon it or to drive them off it when he saw them there before the train could arrive at the point of intersection. As was said in the *Thompson* case, the boy foolishly took it for granted that they would stand still on the road, but they went on, as they were very likely to do, toward the crossing." And it was under these circumstances that the words referred to above were made use of by the learned Judge. After using the words already mentioned, the learned Judge goes on to say: "The servant's plain duty was to have driven those which had not escaped up the road into the field, before going after the heifer. The others were at large on the highway. His attention was withdrawn from them, and while he was absent and thus unable to control their movements, they cannot, in my opinion, be said to have been in charge of anyone within the meaning and for the purpose of the Act." It will be seen that the facts of that case led the Court to hold that the cows were not "in charge."

The Railway Act of 1903 made a slight change—3 Edw. VII. ch. 58, sec. 237 (D.)—and this is brought forward in the revision in the form set out in the early part of this judgment.

I find nothing to shew that it must be held as a matter of law that these cattle were not in charge of a competent person. The boy swore that had the whistle blown or the bell rung, he could and would have got the cattle over the track in time; the jury saw fit to believe him, and, while I might not have found

in the same way had I been trying the case, I cannot say that his story was incredible. The cows were being driven in the manner in which cows are usually driven in this country; and the same precautions which should be taken in the case of horses would be ludicrous in the case of cows. Our farmers do not put halters or bridles on cows; and I can find no authority which compels me to say that they should. I should require express authority.

The statement of Hagarty, J., in the *Markham* case, I think, appeals to common sense, viz.: "If animals usually driven—viz., oxen . . . have to approach or cross a railway, we should naturally consider them as in charge when the person or persons driving them could readily head them off or turn them, if necessary, from the track." There is nothing to shew that the ten-year-old boy could not have done this—the jury have seen fit to believe his own account of his capacity; and I have no right to interfere with their finding.

I think the plaintiff must have judgment for \$200 and costs on the proper scale.

I have not thought it necessary to refer to the other legislation in the matter, as no advantage seems to be derivable from a consideration of these statutes. I have, however, read all the Acts *in pari materiâ*.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE— INFANT.

MANITOBA.]

[COURT OF APPEAL.

WALD V. WINNIPEG ELECTRIC R.W. CO.

(18 *Man. L.R.* 134.)

*Negligence—Street railway—Duty of company to put on wheel guards—
Damages—New trial.*

1. It is negligence in a company operating electric cars on the streets of a city not to have such guards for the front wheels as will prevent persons falling on the tracks from being run over, and the company will be liable in damages to any person injured in consequence of such negligence, unless there is sufficient contributory negligence on the part of such persons to constitute a defence.

2. No such contributory negligence could be attributed to a child under six years old.
3. A verdict for \$8,000 damages in such a case, where one of the child's legs was cut off, is not so excessive as to warrant the Court in ordering a new trial.

THE plaintiff, a child about six years old, brought this action by her father as next friend to recover damages for injuries received. She was knocked down by one of defendants' cars, in consequence of which her right leg was amputated.

The case was tried before PERDUE, J.A., and a jury, when the following questions were submitted to the jury:—

1. Q.—Was the injury to the plaintiff Beckie Wald caused by any negligence of the defendants? A.—Yes.

2. Q.—If your answer is yes, in what did the negligence consist? A.—Defective fender and negligence on the part of the company, by not having car wheels guarded and on the part of the motorman in not looking ahead, in not applying the brakes and in not using sand to stop the car.

3. Q.—In case you think damages should be given, what damages do you assess? A.—\$8,000.

From that verdict defendants appealed.

On October 12, 1908, the appeal was heard before HOWELL, C.J.A., and RICHARDS, J.A.

D. H. Laird and *E. F. Haffner*, for the defendants, appellants. Negligence was charged in five respects and evidence directed to each of them. The jury were asked in what did the negligence consist and their answer includes three of those charged. Upon the evidence and direction the finding of the jury is in favour of the defendants as to negligence charged and not found: *Andreas v. Canadian Pacific R.W. Co.*, 37 S.C.R. 1; *Hanly v. Michigan Central R.W. Co.*, 13 O.L.R. 560. The jury found as negligence (1) defective fender, and (2) not having car wheels guarded, but these are not negligence in law: *Man. Stat. 1892, ch. 56, 1895, ch. 54*. The power to order fenders was granted to the city by the Municipal Act, 1899, ch. 24, sec. 24,

and continued by sec. 703, sub-sec. 137, of the Winnipeg Charter, 1902, but the city has not exercised this power, and the Court will not impose precautions not enjoined by statute. See *King v. Pease*, 4 B. & Ad. 30; *Canadian Pacific R.W. Co. v. Fleming*, 22 S.C.R. 33; *Grand Trunk R.W. Co. v. McKay*, 34 S.C.R. 81; *Lott v. Sydney & Glace Bay R.W. Co.*, 41 N.S.R. 153; *Pitcher v. Peoples*, 34 Atl. Rep. 567; *Platt v. Albany*, 62 N.E. Rep. 1071; *Hogan v. Citizens*, 51 S.W. Rep. 473. The evidence does not support the findings as to negligence charged and the jury have found negligence not charged: *Taylor v. Ottawa*, 5 O.W.R. 564. The direction of the learned trial Judge assumes that as a matter of law a fender is necessary: *Providence v. Gerow*, 14 S.C.R. 731; *Peers v. Elliott*, 21 S.C.R. 19. For direction as to amount of damages: *Central Vermont R.W. Co. v. Franchère*, 35 S.C.R. 75. Damages are excessive. It is not always necessary to take express exception to charge: *Miller v. Manitoba*, 6 Man. R. 487; *Woolsey v. Canadian Northern R.W. Co.*, 11 O.W.R. 1030, and cases cited. The question of whether the plaintiff was capable of negligence or not is one of fact for the jury and should have been submitted to them: *Gardner v. Grace*, 1 F. & F. 359; *Merritt v. Hepenstal*, 25 S.C.R. 150; *Mitchell v. Toronto*, 5 O.W.R. 128; *Flett v. Coulter*, 5 O.L.R. 375; *Potvin v. Canadian Pacific R.W. Co.*, 4 Can. Ry. Cas. 8; *Newell v. Canadian Pacific R.W. Co.*, 12 O.L.R. 21. As to effect of inconsistent findings: *Kerry v. England* (1898), A.C. 742.

R. A. Bonnar and *W. A. Cohen*, for plaintiff, were not called on.

October 12, 1908. HOWELL, C.J.A.:—The evidence put in by the defendants is that the child ran to the car and in some way got under it about half way back between the front of the car and the car wheels. Counsel for defendant states that the bottom of the car is about three feet from the pavement. If the wire wheel guard now in use or one described in the evidence

were then upon the car it seems to me the accident would in all probability not have happened. At most the child would have been thrown back on the pavement. I think there was evidence to justify the finding by the jury that in not putting on the simple device for guarding the front wheels the company were guilty of negligence.

The damages are not so excessive as to lead me to grant a new trial.

RICHARDS, J.A.:—I think the defendants' evidence (which of course the defendants cannot contradict) shews that the plaintiff got under the car owing to the absence of a wheel guard and that, if there had been a wheel guard, the injury would not have happened. There is no ingenuity required to see the need of wheel guards, or how they could be used. They are very simple in construction. Therefore, I do not think the question whether such guards had been in use before or were generally known is material.

I think that at the plaintiff's age, 5 years and 10 months, she could not have been guilty of contributory negligence and I am not satisfied that in the case of an old person acting as the plaintiff did, the evidence would have shewn such negligence on his part.

I do not think the damages excessive, considering how materially the plaintiff's life will be marred by the injury.

The appeal should be dismissed with costs.

Appeal dismissed.

See next case.

WINNIPEG ELECTRIC R.W. CO. v. WALD.

(41 S.C.R. 431.)

New trial—Misdirection—Questions for jury—Verdict on issues—Damages.

An order for a new trial should not be granted merely on account of error in the form of the questions submitted to the jury where no prejudice has been suffered in consequence of the manner in which the issues were presented by the charge of the Judge at the trial and the jury has passed upon the questions of substance.

9—IX. C.R.Y.C.

The judgment appealed from (18 Man. L.R. 134) was affirmed, the Chief Justice dissenting, and Davies, J., *hesitante*, as to the quantum of the damages awarded.

APPEAL from the judgment of the Court of Appeal for Manitoba, 18 Man. L.R. 134, affirming the judgment entered upon the findings of the jury, by Perdue, J., at the trial, in favour of the plaintiff, for \$8,000 damages, with costs.

The circumstances of the case and the questions in issue on this appeal are stated in the judgments now reported.

On February 17 and 18, 1909, the appeal was heard before Sir Charles Fitzpatrick, C.J., and Girouard, Davies, Idington and Duff, JJ.

Watson, K.C., and Laird, for the appellants.

Cohen, for the respondent.

March 29, 1909. THE CHIEF JUSTICE (dissenting) :—I agree with Mr. Justice Duff that, in the circumstances of this case, the question as to whether a child of tender years can be held at law to be incapable of contributory negligence does not arise. The Judge clearly put to the jury the question of plaintiff's contributory negligence and properly directed them as to that issue.

I am, however, of opinion that the damages are grossly excessive and on that ground I would grant a new trial.

I wish further to express my astonishment at the defence put forward by the company to the effect that they are not bound to equip their cars with such fenders and guards as are generally considered indispensable for the protection of human life. Jurors can scarcely be blamed if, in cases arising in communities where such defences are raised, they take an exaggerated view of the companies' liability when accidents occur.

GIROUARD, J.:—I think this appeal should be dismissed with costs for the reasons stated by Mr. Justice Duff.

DAVIES, J.:—I adopt the reasoning and conclusion of my brother Duff with respect to the findings of the jury on the two

incompatible theories or contentions submitted to them on behalf of the respective parties, and also with respect to the alleged contributory negligence of the child. It was quite open to the jury on the evidence to have accepted the version of facts contended for by either party as the true one.

The evidence was very conflicting and was fairly submitted to them by the trial Judge. They accepted the plaintiffs' theory and contention as to the facts which caused the accident, and in so doing necessarily negatived those of the defendants. That being so, their findings of negligence with respect to the defective fender and want of care in the motorman in keeping a proper lookout cannot now be impeached.

I also agree that on such findings of the jury, which there was ample evidence to sustain, the defence of contributory negligence must fail and is in fact practically eliminated from the case.

It becomes unnecessary to consider, under these circumstances, what is the law with respect to contributory negligence on the part of a child six years of age or whether the learned Judge misdirected the jury on that point when he held it to be a question of law for him to decide, as I agree, under the findings of the jury and the evidence, the appellants could not have sustained any prejudice from the Judge's ruling on the point.

I am by no means, however, satisfied on the question of the damages awarded by the jury. In my opinion, considering the age, position in life and prospects of the injured child, the damages were grossly excessive. As, however, the Court of Appeal did not think a new trial should be granted on this ground and a majority of this Court concurs in the same opinion, I will not formally dissent.

IDINGTON, J.:—This action was brought by an infant to recover damages arising from her being, when aged five years and eleven months, knocked down and so far run over and dragged by the appellants' electric street car on the main street of Winnipeg, that I am not surprised at the amount of the verdict when founded on such negligence as shewn to have caused such results.

The case was tried before Mr. Justice Perdue with a jury, who found by their answers to his questions that this accident was caused by the negligence of the defendants, now appellants; that the negligence consisted in "defective fender and negligence on the part of the company not having car wheels guarded and on the part of the motorman in not looking ahead and in not applying the brakes and in not using sand to stop the car; and they assessed the damages at \$8,000."

The Court of Appeal for Manitoba having refused to disturb the judgment entered according to this verdict, we are asked to do so.

There was evidence that the fender failed to respond to the motorman's attempt to operate it, that the car wheels were not guarded as they might have been and as cars elsewhere had been and one car on appellants' line also was at the time, and also from which it might be inferred the motorman had not been looking or he might have seen and done more to save the girl.

The case, therefore, could not have been properly withdrawn, in regard to any one of these causes of complaint, from the jury.

They were with those of excessive speed and failure to ring the gong the questions properly raised by the pleadings and the evidence.

The additional findings are harmless surplusage and neither add to nor detract from the strength of the others and possibly are germane to the question of speed and doubtless form the answer the jury found as to the charge of high speed.

The contention that inasmuch as the city authorities had not, as the contract between the appellant and the city empowers them, directed a specified fender to be used, none need be used, is so untenable, I am surprised to find it raised as an arguable point of law in this case; though for the second time such a contention has been set up in this Court within the past sixteen months.

The only other question seriously raised as to the conduct of the trial arises out of the refusal of the learned trial Judge to

submit to the jury some sort of question as to whether or not the plaintiff could by the exercise of reasonable care have avoided the injuries; and instead of doing so telling the jury that "this little child only six years old is not accountable for negligence like a grown person," to which the defendant's counsel at the trial took "very strong exceptions."

Counsel, on the learned Judge's explaining what he had said as to such a contention, modified his demands and put it in a more reasonable way yet inaccurate in law and asked his Lordship "to tell the jury that the child is responsible for its acts as far as it realizes what it is doing."

The jury, thereupon, were recalled by the learned Judge when he removed from the case all ground for reasonable objection in putting the matter as I am about to quote from this supplementary charge.

To understand it one must appreciate the issues of fact he presented to the jury.

On the one hand the plaintiff's witnesses shewed that she had gone across the track in course of going to school and, when on the strip seven feet wide between the tracks, saw cars coming in opposite directions and got frightened at that, hesitated, retraced her steps to return to the side whence she had come and got caught in the result by the car. The fender failed to trip, and she fell underneath instead of above it as she might have done if it had operated properly.

On the other hand the defendant's witnesses, including the motorman, pretended she never had come in front of the car, but was between the sidewalk and the track, running from a boy snowballing her; and had with her shawl over her head run against the side of the car or vestibule of the car, got knocked under it and hence her injuries.

Now the Judge speaking of these conflicting presentations of the facts said as follows:—

"Now if you believe that (referring to the latter one) and the other witnesses for the defence the company would not be guilty of negligence. I thought I had made that clear to you,

but if you believe the defendants' account of how the accident occurred, that the child ran across in that way and struck the vestibule of the car before the motorman could stop it, and that he did take steps to stop it, then the defendants would not be guilty of negligence. Then your proper answer to the first question would be "No."

No objection was made to this as a proper disposition of counsel's objection.

It was impossible for the jury to find for the plaintiff on this charge except by first finding the story of defendants' witnesses untrue, and if that is thus eliminated no evidence remains that would have justified a finding of contributory negligence of the kind any child of five years and eleven months old can conceivably have attributed to it.

The hesitation, doubt and trepidation she evidently felt and exhibited would have been excusable in one much older.

To appreciate the legal bearing of what we have to deal with let us see what the law, so far as developed, really is.

Though the law fixes an age limit for responsibility in some cases, none for the application of the doctrine of contributory negligence has yet been so definitely fixed as to furnish a uniform rule of law to guide us in all possible emergencies that may arise in the conduct of children.

The same sort of reasoning that led to fixed ages as lines at which responsibility may be drawn in some cases tends with the progress of changed and changing conditions to develop a fixity of law. What has so far happened in legal development as to contributory negligence also is briefly this.

Just one hundred years ago a great master of English law and language is said (in *Butterfield v. Forrester*, 11 East 60, to have formulated for the first time, so far as reported cases give us the law, the doctrine of contributory negligence. His comprehensive proposition, doubtless the result of earlier law, has been qualified as the exigencies of time and place and occasion seemed to furnish reason therefor.

The case of *Lynch v. Nurdin*, 1 Q.B. 29, thirty years later, raised and settled in a large measure the necessary qualification where infants as plaintiffs were concerned. That case was one where a lad nearly, but under seven years, had with a playmate jumped into a cart, left unattended on the street by the owner's servant, who ought to have been in charge, and the horses spurred up by the playmate moved on and the plaintiff boy received in the result a broken leg.

No one claimed at the trial of that case to raise as such the question of contributory negligence as a bar to recovery; but the boy's acts and age were considered by the jury under the direction of the trial Judge and the jury then and thus possessed of the whole case found a verdict for the boy.

This was moved against and the whole subject dealt with by the Court when it was expressly found that whether contributory negligence or however looked at it, the child's act, was only what might be expected of a child of such tender years and hence furnished no bar to the action.

That decision leaves all that is to be found in this case well within the limits of the due allowance to be made when applying the law of contributory negligence in the case of infants suing for damage done them by reason of the negligence of another.

It has been maintained as good law down to this time. The only two expressions of doubt as to it each related to the negligence of a defendant and not that of a child's contributory negligence, and even that doubt it is said is attributed in one of these cases erroneously to Lord Esher. See page 163(*n*), of the Canadian edition of Beven. Besides it is referred to in *Engelhart v. Farrant* (1897), 1 Q.B. 240, at page 247, by Rigby, L.J., as if law, and I find Lord Esher, one of the Court, disposing of the case in which this happens.

It was accepted as law in the case of *Sangster v. T. Eaton Co.*, 25 O.R. 78, 21 A.R. 624, upheld on appeal here, 24 S.C.R. 708.

In *Ricketts v. Markdale*, 31 O.R. 180, 610, the late Mr. Justice Ferguson, whose care and accuracy were most notable, wrote

the judgment fully concurred in by the whole Court, dealing with this phase of the law.

He quoted approvingly American and other authorities the gist of which is that no more can in any event be required that that the child should do what might be expected of an ordinary, careful and prudent child; that everywhere a child of six or seven years is presumed to be incapable of contributory negligence; and that it is not attributable to a child of tender years.

No one now pretends to support literally the defendant's contentions at the trial, but it is claimed that a varying standard as set up for older infants in many cases, ought to extend to this child. No such rule can be found to have been laid down in English or Canadian cases as law in the case of child under seven. The cases chiefly relied upon are American. It may be hard enough to reconcile the utterances of our own high authorities without going abroad.

The learned trial Judge evidently had in view, in dealing with the facts presented to him, the law as laid down by this Court in the case of *Merritt v. Hepenstal*, 25 S.C.R. 150, at page 152, when the Court through the then Chief Justice, Sir Henry Strong, adopted the law as laid down in *Gardner v. Grace*, 1 F. & F. 359, by Channell, B., as follows:—

“The cases shew that the doctrine of contributory negligence does not apply to an infant of tender age. To disentitle the plaintiff to recover it must be shewn that the injury was occasioned entirely by his own negligence.”

I find on reference to the original record of the *Merritt Case*, 25 S.C.R. 150, that the child in question there was only three years of age.

Yet so far as it goes the law there laid down is binding on us and must be applied as our guide as I infer the learned trial Judge tried to apply it.

The term “an infant of tender age” there used is that which is most widely used as to various ages up to six or seven years in the cases most carefully thought out. In *Lynch v. Nurdin*, 1 Q.B. 29, the plaintiff was referred to as “a child of very tender

age between six and seven." I incline, therefore, to hold we might well follow the proposition just quoted and that the learned Judge's reason for excluding the question of contributory negligence was right.

It is not necessary to say more than this that, on his view of the facts, the proper question was to determine not as to contributory negligence, but whether or not the injury was within the above rule and occasioned entirely by the negligence of the child.

Mere refusal at the request of a defendant to submit a question relative to contributory negligence to the jury is not in itself misdirection; for the first question the Judge has to solve is whether or not there is any evidence bearing on the point.

Submitting needless questions or issues for consideration, only tends to confusion and perplexity in the minds of the jury.

Here the remark addressed to the jury as to contributory negligence was absolutely harmless, and although beside the question also quite correct so far as it went.

The appellants' counsel were pressed in argument here to specify the facts in evidence on which they relied to furnish ground for a direction as to contributory negligence and resorted to the evidence for the defence which the learned Judge as above set forth told the jury if true furnished a complete defence. He chose to treat that evidence as bringing the case within the second branch of the rule quoted above. The appellant cannot surely complain of this. I would not desire to commit myself to its absolute accuracy as to its bearing on the plaintiff's case, but the course the jury were directed to pursue was exactly what would have been the case had the learned Judge called what he spoke of contributory negligence instead of substituting, not in actual words but in truth, injury occasioned wholly by the child's own act. Many such cases have been passed upon already. Treating this as of that class of defence, could not, did not, mislead the jury.

The jury refused to believe appellants' side of the case and that evidence is thus put out of consideration here.

The charge was lucid and fair, and so far as it omitted, at first, anything the defendant's counsel complained of was on the recall of the jury properly supplemented so far as in law it could be.

What happened as to the nature of the objections taken and the Judge's charge in *Hansen v. Canadian Pacific R.W. Co.*, 40 S.C.R. 194, are so similar to this case in that regard that what we did there might if need be referred to and followed.

The doctrine of the negligence of the parents being imputed to the child was set up in argument, but I confess to being unable to apprehend its bearing on this case if we have regard only to English and Canadian authorities. The American authorities are so conflicting as to help little if at all.

I think the appeal should be dismissed with costs.

DUFF, J.:—It is, I think, hopeless to impeach the verdict in this case as against the weight of evidence. A question, however, which requires examination is raised by the appellants' contention that the learned trial Judge improperly withdrew from the jury the defence of contributory negligence pleaded by them.

The action was the outcome of an accident in which the infant respondent (a child not quite six years old) was run down by the appellants' car and seriously injured. The mishap occurred on Main Street, Winnipeg, just opposite the entrance to a cross street known as Stella Avenue. On Main Street, which runs north and south, the appellants have a double track; and the car referred to was, when the accident took place, running south on the westerly track. The respondent with other children had just come out of Stella Avenue, which opens into Main Street at its westerly boundary, and was crossing the latter street on her way to school.

Two wholly incompatible accounts of the occurrences were presented to the jury by the respective parties. According to the case presented on her behalf at the trial, the respondent crossed the westerly track in safety, but, seeing a car on the

easterly track coming from the south, she became confused, and, attempting to return across the westerly track, was knocked down just as she reached the most westerly rail.

The appellants' case was that the respondent never crossed the westerly track at all; but, playing at snowballs with one of her companions—and not observing the car—ran against the side of the vestibule and slipped under the body of the car in front of the wheel that crushed her.

These were the rival cases presented to the jury; and the appellants' complaint which we have to consider is that the learned trial Judge (holding that in law contributory negligence could not be imputed to a child of the respondent's years) withdrew that issue from the jury.

I do not think it is necessary to decide whether under the law of England, which on this subject prevails in Manitoba, the ruling of the learned Judge on this point is open to objection.

In *Merritt v. Hepenstal*, 25 S.C.R. 150, this Court seems to have held that, in such a case, in order to succeed the defendant must shew that the injury was occasioned entirely by the negligence of the child; and it was upon this view that the learned trial Judge acted. I should prefer, however, to reserve for future consideration the exact effect of that decision and to rest my judgment on this appeal on other grounds.

The learned trial Judge instructed the jury that if they accepted the account of the accident advanced by the appellants they should dismiss the action. In face of this instruction (even assuming the question of contributory negligence to be in such a case a question of fact, depending on the views of the jury and the ruling of the learned trial Judge touching the degree of care to be expected from a child of tender years to the opposite effect therefore erroneous), I am not able to discover any ground upon which it can be said that the appellants have by reason of that ruling suffered any prejudice.

The learned Judge, had he submitted to the jury the defence proposed, would unquestionably have told them that there was nothing in the facts to support that defence, if they accepted the

account of the child's movements just preceding the collision which was put forward on her behalf. He might, perhaps, have told them also that, if they accepted the appellants' account, it would be a question for them whether the plaintiff's conduct had fallen below the standard of reasonable care to be expected from a child of her years; but in point of fact the learned Judge put the question in a form much more favourable to the appellants. He told them that if they accepted that account the action should be dismissed. This error—which was error in form only, if error at all—could not possibly prejudice the appellants.

In truth the verdict shews that the jury rejected the appellants' view of the accident and acted upon the respondent's account; and, on the hypothesis that the latter accorded with the facts, it is not open to dispute that the defence of contributory negligence must fail.

On this ground (that assuming the learned Judge misdirected the jury an examination of the charge as a whole and of the findings of the jury shews that the misdirection was innocuous) I think the appeal should be dismissed.

Appeal dismissed with costs.

Munson, Allan, Laird & Davis, for the appellants.

Bonnar, Hartley & Thornburn, for the respondent.

[PRIVY COUNCIL.]

LIABILITY OF RAILWAY COMPANIES FOR FIRES.

BLUE V. RED MOUNTAIN R.W. CO.

([1909] A.C. 361.)

Law of Canada—Railway Act, 1888, sec. 134—Railway Act, 1903, secs. 128, 239—Admissibility of railway map by the Appellate Court—Damages by fire—Ignition of combustible matter on railway—Right of way—Negligence.

By sec. 239 of the Railway Act (3 Edw. VII. ch. 58), it is provided that the respondent railway company shall at all times keep its right of way

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free from combustible matter, sub-sec. 2 providing that when damage is caused by a fire started by a railway locomotive the company shall be liable whether guilty of negligence or not, in the latter case the liability being limited to a specified amount.

Where ignition occurred from the respondents' engine sparks at a rocky bluff shown by a map filed by them in the Department of Railways and Canals under sec. 134 of the Railway Act of 1888, repeated by sec. 128 of the later Act, to be within the delineated right of way, the respondents were held to be liable for the damages assessed by the jury.

The Supreme Court of Canada, having on the objection of the respondents refused to admit the map in evidence on the ground that it had not been tendered at the trial, ordered a new trial:—

Held, that whether or not the Supreme Court was right in refusing to admit the map their lordships would admit it, that it was conclusive in favour of the appellants, and that there had been no misdirection.

APPEAL by special leave from a judgment of the Supreme Court (November 20, 1907) reversing a judgment of the Supreme Court of British Columbia (January 21, 1907) and ordering a new trial on the ground of misdirection.

The action was for damages for the respondents' negligence in that the fire which in August, 1905, destroyed the appellants' premises, was started by a spark from an engine of the respondents on their right of way, and that this right of way had not been maintained and kept free from combustible matter in accordance with the Railway Act of Canada. The jury found for the appellants. The Supreme Court of British Columbia refused a new trial, Hunter, C.J., holding that there was evidence before the jury upon which they might reasonably come to the conclusion that the fire originated within the respondents' right of way; Martin, J., dissenting on the ground that the Judge had misdirected the jury in telling them that they must decide the question whether the fire had jumped certain intervening unburnt ground and come over to the plaintiffs' premises, first upon their inspection of the ground, and then, if they could not decide upon that, by calling to their assistance the oral evidence.

The respondents appealed to the Supreme Court of Canada, the appellants having since the hearing in the Supreme Court of British Columbia searched for and found the map or plan mentioned in their Lordships' judgment of the completed railway of the respondents which had been filed by them on March

15, 1897, under sec. 134 of the Railway Act, 1888. The Supreme Court refused to admit it, relying on sub-secs. 51 and 73 of the Supreme Court Act, R.S.C. 1906, ch. 139, but they ordered a new trial on the ground of misdirection, holding that the charge could have left no doubt on the minds of the jury that if in exercising their statutory power under sec. 118(i), the respondents had left material which became ignited by sparks from their locomotive, their having done so would be evidence of actionable negligence, which was not the case made out by the pleadings.

Sir R. Finlay, K.C., and C. R. Hamilton, K.C., for the appellants, contended that the plan deposited under sec. 134 ought to have been admitted in evidence by the Supreme Court. The sections relied upon did not prohibit the admission, and the plan was conclusive as to the rocky bluff being on the right of way. There was no misdirection, and the jury by their finding as to the right of way shewed that they had been directed to the case made out by the pleadings. They referred to the Railway Act, 1888, 51 Vict. ch. 29, sub-secs. 90, 103 and 134, and the Railway Act, 1903, 3 Edw. VII. ch. 58, sub-secs. 118(i), 138, 139 and 239, and to 3 and 4 Wm. IV. ch. 41, sec. 7, and *Safford and Wheeler*, Privy Council Practice, p. 33.

J. A. Simon, K.C., and Bremner, for the respondents, contended that the Supreme Court were right in not admitting the plan. There was misdirection, as the Judge told the jury that they were at liberty to disregard the evidence and determine for themselves, after viewing the place, whether the fire which caused the damage complained of was the fire which started from the railway. The Judge failed to point out to the jury that the statutory obligation to keep the right of way free from combustible material did not apply to the adjoining land, upon which the respondents were under sec. 118(i) of the Act of 1903, entitled to enter and fell trees. He practically told the jury to find that the rocky bluff was within the right of way, and did

not define right of way or point out what evidence would entitle them to find that the rocky bluff was situated thereon. Section 239 of the Act of 1903 on its true construction, did not apply to the rocky bluff. Upon the point as to the jury being told to act on their own knowledge and eyesight, see *London General Omnibus Co. v. Lavelle* (1901), 1 Ch. 135; *Jose v. Metallic Roofing Company of Canada* (1908), A.C. 514.

The judgment of their Lordships* was delivered by

March 31, 1909. LORD SHAW:—The plaintiffs (appellants) are sawmill owners and timber merchants who own certain property in the neighbourhood of Rossland in the Province of British Columbia. The defendants, the Red Mountain R.W. Co., own and work a line of railway running northwards to Rossland from the boundary line of British Columbia and the United States of America.

On August 24 and 25, 1905, certain property of the plaintiffs was destroyed by fire. The allegation is that this fire originated on the 23rd, upon the property of the railway company, and by reason of their negligence. The fire swept in a northerly direction; the damage caused to the plaintiffs' property has been assessed by a jury at \$18,000.

In the plaintiffs' statement of claim it is averred that the defendants "started a fire on their right of way;" that the right of way was not kept "free from dead or dry grass, weeds, or other unnecessary combustible matter;" and that the fire "was started through the negligence of the company." These allegations the company deny. Both parties refer to the provisions of the Railway Act, 1888, 51 Vict. ch. 29, and the Railway Act, 1903, 3 Edw. VII. ch. 58. By sec. 239 of the latter statute it is provided that "the company shall at all times maintain and keep its right of way free from dead or dry grass, weeds, and other unnecessary combustible matter." By sub-sec. 2 it is provided that, when damage is caused by a fire started by a railway locomotive, the company, whether guilty of negligence or not, shall be liable, a proviso being added that the liability shall

*Lords Atkinson, Collins, Shaw and Sir Arthur Wilson.

be limited to \$5,000 if no negligence be proved. It is plain that, if the company did not maintain and keep its right of way free from combustible matter, they directly contravened the substantive provision of the statute. This negligence the jury has affirmed.

But the railway company throughout the proceedings in Canada strongly maintained that the point where the fire originated was not upon its right of way; and any difficulties which arise in the case spring from this contention. The ignition from engine sparks occurred at a rocky bluff on the north side of the track. Whether that rocky bluff was on the railway company's right of way is a point which, upon the pleadings, the railway company deny, and of which, in evidence, their witnesses professed ignorance. The awkwardness and possible injustice arising from doubt in such a state of matters are manifest, and this is well illustrated in the course of the present action. But so far as the Legislature of Canada is concerned every precaution had been taken by statute to prevent these. In both of the Railway Acts of 1888 and 1903, already cited, careful provision had been made not only for a clear delineation on plan of the location, width, and extent of the line, but by sec. 134 of the former Act, which is substantially repeated by sec. 128 of the latter, a "plan and profile of the completed railway and of the land taken or obtained for the use thereof" is to be made and filed with the Board; (2) plans, etc., of the parts located in different districts and counties are to be filed in the registry offices for those districts and counties; and (3) any railway company which fails in the duty of making and filing as above is liable to a statutory penalty of \$200 per month. In face of these clear provisions the plaintiffs, in preparing the case for trial, very naturally administered the following interrogatory to the defendants: "What width is your right of way between said trestle and the section house as shewn on your plans filed under the provisions of the Railway Act?" To this question, founded upon the statute, the following answer is given by the secretary of the company: "No plans of the completed line of railway of the

defendants have been filed under the provisions of the Railway Act." One need not go through these protracted judicial proceedings in detail; but from them two things are abundantly clear, (1) that the railway company continued to assert as matter of fact that the plans, which it was their duty under the Acts of Parliament to make and file, had not been so made, or at least so filed, and were not available and could not be produced; and (2) that they have raised many objections and interposed many obstacles in the way of the plaintiffs otherwise establishing—by the evidence of those who laid out the railway and of acts of possession, including the slashing of timber, etc., since then—that the right of way did embrace the rocky bluff.

After viewing the ground and hearing the evidence the jury had the specific question put to them: "Is the rocky bluff mentioned in the evidence within the right of way of the defendants?" And to this the jury answered "Yes," finding for the plaintiffs and assessing the damages as before mentioned.

An appeal on the ground of misdirection was made by the defendants to the Full Court of the Supreme Court of British Columbia, and that Court, one of the learned Judges dissenting, dismissed the appeal. An appeal was then taken to the Supreme Court of Canada, and on November 20, 1907, that Court gave judgment allowing the appeal and ordering a new trial. From that judgment the appeal to the Privy Council, special leave having been given, is now made.

Before the hearing in the Supreme Court of Canada was reached this circumstance had occurred, namely, that the plan which according to the contention maintained throughout by the railway company had either never been made, or at least never been filed, had been actually discovered and was in fact available. It was tendered by the plaintiffs to the Supreme Court of Canada, and it is plain that it not only was equivalent to the writ of the railway company, but that by the law of Canada it was a document to be filed with the Board and in the registry of the district through which the railway passed, and that, in short, its availability for public reference was part of the policy of the Legislature. The defendants objected to the production

of the plan, and the Supreme Court of Canada itself precluded from admitting it to evidence, the learned Chief Justice, Sir Charles Fitzpatrick, expressing hesitation upon the point and his regret that it was not possible to entertain the application of the plaintiffs.

It was not necessary to decide whether the Supreme Court of Canada was precluded by law from admitting this document, and the point was not fully argued before their Lordships. But it is at least clear that the Judicial Committee of the Privy Council is not so precluded, but, on the contrary, has power to admit and look at the document. This was conceded by both sides. The plan is docquetted as follows:—

“Map of Constructed Line.

“Red Mountain Ry.

“Scale—1 inch—400 feet.

“E. J. ROBERTS, *Chief Engineer*.

“Plan of completed railway filed in the Department of Railways and Canals this 15th March, 1897, under section 134 of the Railway Act of 1888.

“COLLINGWOOD SCHREIBER,

Deputy of the Minister of Railways and Canals.

“Ottawa, 15th March, 1897.”

There is no substantial dispute as to what it discloses. Put in a word, the railway company's own plan shews that the rocky bluff where the fire originated was within the delineated right of way. What the jury had arrived at after a troublesome and involved investigation is proved, so to speak, under the railway's own hand to have been right, and the arguments on that head submitted by the defendants, both before and after the plan was discovered, to have been wrong.

It is not necessary to examine in detail the judgment delivered by Duff, J., in the Supreme Court of Canada. It proceeds upon the footing that the plan was not available. Having now been produced, it demonstrably contradicts the result arrived at, namely, that the plaintiffs had failed to establish that

the fire had originated upon the defendants' right of way, and this is an end of that portion of the case.

What remains is an argument which was carefully presented to their Lordships, to the effect that Morrison, J., the learned Judge who presided at the trial, misdirected or failed sufficiently or properly to direct the jury. This point does not appear to have been raised in the Supreme Court of Canada, and that Court does not deal with it. In their Lordships' opinion there was no misdirection and they cannot agree with the opinion of Martin, J., who dissented from the decision of the Full Court of British Columbia. It is not contended that the verdict is against the weight of evidence. All that is said is that by a certain sentence in the charge of Morrison, J., the jury were substantially directed to exclude all oral evidence from their minds. In dealing with the physical possibility of the fire leaping over from one point of ground of considerable altitude to the south of the plaintiffs' buildings and reaching at a distance of 600 yards or so the lower altitude where these buildings were situated the learned Judge properly gave much prominence to the view which had been obtained by the jury of the locality, and he said: "Whether the fire which burned all these limits was a continuation of that fire which started down there so small and innocently at the Red Mountain track, it is for you to say whether you can determine that for yourselves, regardless of what was said for or against." Were that sentence to stand by itself, some colour might be given to the contention put forward, but in the very next sentence the learned Judge adds: "If you cannot decide from your own inspection then you must call to your assistance the oral testimony, the evidence of those whom you have heard. Do you believe from what you saw and what you have heard that it was the same fire that started from the railway that destroyed Blue & Deschamps' timber?"

Taking these sentences in immediate context together, it seems impossible to maintain that there was the misdirection suggested, and their Lordships do not think it legitimate, in considering a Judge's charge to a jury, to separate a single sen-

tence in the manner suggested, unless such a sentence in fact dominated the reasoning upon which that portion of the charge was founded. Misdirection, to be a ground of new trial, must be substantial misdirection.

It is unnecessary to consider the further point put before their Lordships, namely, that there had been certain evidence that the fire at the St. Louis buildings must have started in point of time before the fire which originated upon the railway could have reached near that spot. In their Lordships' opinion (1) the learned Judge, in the latter portion of his charge, put the direct origination of the fire plainly before the jury, and upon that obtained an answer, and (2) in so putting the point, their Lordships do not think it was necessary for him to explain to the jury that they had heard evidence from certain witnesses suggesting that the fire on the plaintiffs' premises could not have been caused by the fire from the right of way, because its outbreak had preceded the time when the railway fire reached the vicinity of the St. Louis buildings. Their Lordships do not think that it was the Judge's duty to assume that a jury, considering the cause of a fire at the St. Louis buildings, might fall into the fundamental error that this fire, as an effect, preceded instead of succeeded the originating cause, namely, the right of way fire. In their Lordships' opinion the effect of the reference by the Judge to the jury's view of the locus has been much exaggerated, and the jury were properly left to put together all that they had seen and heard.

Their Lordships will therefore humbly advise His Majesty that the judgment of the Supreme Court of Canada should be reversed with costs and the judgment of the Full Court of British Columbia restored.

The respondents must pay the costs of this appeal.

Blake & Redden, for the appellants.

Norton, Rose, Barrington & Co., for the respondents.

NOTE: In this case the judgments of the Supreme Court of British Columbia and the Supreme Court of Canada are reported respectively at 6 Can. Ry. Cas. 219, and 7 Can. Ry. Cas. 150.

PASSENGER TOLLS—THIRD-CLASS FARES.

[PRIVY COUNCIL.]

GRAND TRUNK R.W. CO. V. ROBERTSON.

([1909] A.C. 325.)

Province of Canada, 16 Vict. ch. 37, sec. 3—Dominion Railway Act, 1906 (6 Edw. VII. ch. 42)—Construction.

Section 3 of 16 Vict. ch. 37 (Province of Canada), is not inconsistent with or impliedly repealed by the Dominion Railway Act, 1906 (6 Edw. VII. ch. 42).

Accordingly the appellants are bound to carry third-class passengers for the fare of a penny per mile, and to provide one train every day with third-class carriages between Toronto and Montreal.

APPEAL by special leave from a judgment of the Supreme Court (December 13, 1907) affirming a judgment of the Board of Railway Commissioners for Canada (July 4, 1907).

The question raised in this appeal and also before the Supreme Court was limited to this: Whether that portion of sec. 3 of the special Act of the Province of Canada (as it then was) incorporating the Grand Trunk Railway Company of Canada, 1852 (16 Vict. ch. 37), which required that the fare or charge for each third-class passenger by any train on the railway of the said company should not exceed one penny currency for each mile travelled, and that at least one train having in it third-class carriages should run every day throughout the length of the line of the said railway, is now in force.

Under sec. 26 of ch. 37 of the Revised Statutes of Canada, 1906, the respondent applied to the Board of Railway Commissioners for Canada alleging that it was in the interests of the public that the Grand Trunk Railway Company of Canada should be compelled to perform its statutory obligations. The obligation sought to be enforced was that under the said sec. 3 of the company was bound to carry third-class passengers for the fare of a penny per mile for each mile travelled, and to provide that at least one train having in it third-class carriages shall

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run every day throughout the length of its line between Toronto and Montreal.

Section 3 of the special Act is as follows: "And be it enacted that the gauge of the said railway shall be five feet six inches; and the fare or charge for each first-class passenger by any train on the said railway shall not exceed two pence currency for each mile travelled, the fare or charge for each second-class passenger by any train on the said railway shall not exceed one penny and one-half penny currency for each mile travelled, and the fare or charge for each third-class passenger by any train on the said railway shall not exceed one penny currency for each mile travelled; and that at least one train having in it third-class carriages shall run every day throughout the length of the line." The clause with respect to "tolls" in the Railway Clauses Consolidation Act (14 & 15 Vict. ch. 51), were by sec. 2 of the special Act made a part of that Act.

The part of sec. 3 dealing with the gauge of the railway was repealed by an Act of the Parliament of Canada, namely, 36 Vict. ch. 18, sec. 23.

The appellants contended before the Railway Board that the provisions of the special Act of 1852 had been impliedly repealed by subsequent legislation, and relied on Railway Act of Canada, 1903 (3 Edw. VII, ch. 58), ch. 37, R.S.C. 1906, sec. 6, which is as follows: "Where any railway the construction or operation of which is authorized by a special Act passed by the legislature of any province is declared by any Act of the Parliament of Canada to be a work for the general advantage of Canada, this Act shall apply to such railway and to the company constructing or operating the same, to the exclusion of such of the provisions of the said special Act as are inconsistent with this Act and in lieu of any general railway Act of the province."

The Chief Commissioner, Killam, J., after a detailed examination of the relevant legislation, ruled that the clause of the

special Act of 1852 requiring the running of third-class carriages and limiting third-class fares was not affected by any legislation prior to the Railway Act of 1906. The material passages of his judgment are as follows: "As has been said, the provisions of the special Act have not been expressly repealed. None of the enactments in the Railway Act, 1903, or in the present Railway Act, are explicitly inconsistent with those provisions. The contention on the part of the railway company is that, in effect, these enactments, and particularly the portions relating to tolls and those giving the Board jurisdiction respecting the accommodation, etc., to be furnished by the company, are so inconsistent as impliedly to repeal the provisions of the special Act . . .

"Under the Railway Clauses Consolidation Act and all the succeeding legislation, down to the Act of 1903, railway tolls were subject to the approval of, and to be altered by, the Governor-in-Council. This limitation upon the company's powers was embodied in the special Act by reference to the general Act. The jurisdiction of the Governor-in-Council could exist, therefore, consistently with the limitation as to fares imposed by the special Act, and it does not appear to me that the substitution of the Board of Railway Commissioners as the body which is to approve, and which has the jurisdiction to alter, railway tolls makes any change in this respect. Under the former legislation, all the railway tolls required the approval of the Governor-in-Council; under the present, it is only the standard or maximum tariffs which must be approved by the Board; and railway companies are authorized to make special tariffs imposing tolls lower than those in the standard tariffs. The practice has been for the companies to obtain approval of standard passenger tariffs, not distinguishing between classes, and to provide for second-class fares by special tariffs. Third-class fares could be provided for in the same way. I do not think that the provisions requiring special tariffs are necessarily inconsistent with the limitations imposed by the special Act or that they are sufficient to indicate the intention of Parliament

that the company, in framing special tariffs, is to be free from such limitations . . .

“The imposition of this system was one of the terms and conditions upon which the company was granted its franchise, and it should not readily be presumed that Parliament intended to relieve the company from such terms and conditions.”

The Supreme Court affirmed the judgment of Killam, J., substantially for the reasons stated by him.

February 15, 1909. *Sir R. Finlay*, K.C., and *D. L. McCarthy*, K.C., for the appellants, contended that the judgment should be reversed. The appellant company had in 1853 entered into an amalgamation agreement with other railway companies which in 1854 was confirmed by 18 Vict. ch. 33 (Province of Canada). A new company was thus created, authorized to construct a new undertaking, and by that Act of 1854 and the Railway Act of 1859 the right to vary passenger tolls was vested in the directors of the new company. If the pre-Confederation statutes were no longer in force after Confederation, then the defendants were subject to the Dominion Railway Acts of 1868 and 1879, whose provisions in regard to tolls completely overrode and repealed the clauses regarding tolls in the appellants' special Act of 1852. On the other hand, if the new company and undertaking are still subject to the provisions of the special Act of 1852, the provisions of the Railway Act of 1883 (see sec. 12, sub-sec. 6) are so inconsistent therewith the clause therein relating to tolls could not still remain in full force. Besides, the wide powers vested in the Board of Railway Commissioners by the Railway Act of 1903 and the amending Act of 1906 (being ch. 42) are inconsistent with their being tied down by the Act of 1852 to specific defined rates and mode of travel. If this Board can vary the type of car and accommodation as they please, they must surely be allowed to change the fare. It was contended that provisions contained in the special Act with regard to tolls were quite inconsistent with the later Acts of 1903 and 1906 and must be deemed to have been repealed.

Hamar Greenwood and *Horace Douglas*, for the respondent, contended that the statutory duty imposed on the appellants by sec. 3 of their special Act was clear and express. The Board of Railway Commissioners held in effect that sec. 3 had never been repealed, is not inconsistent with any subsequent enactment, and is of full force and effect. It was contended that that ruling was right. So long as sec. 3 stands the respondent is entitled to have it enforced. The Acts of 1903 and 1906 were not inconsistent with the Act of 1852, for the powers given thereby to the Board were to enforce the provisions of that Act, not to alter, amend, or vary them. It is said that those provisions are now out of keeping with the practice of railroading as adopted in Canada. However that may be, the Act is in force, and if any inconvenience results it must be endured until the section in question is repealed.

Sir R. Finlay, K.C., in reply.

The judgment of their Lordships* was delivered by

February 17, 1909. LORD LOREBURN, L.C.:—The question on this appeal really is whether or not sec. 3 of the Act of the late Province of Canada of 1852 (16 Vict. ch. 37), is impliedly repealed by the Dominion Railway Act of 1906 (6 Edw. VII. ch. 42), which is to prevail when the provincial Act is inconsistent with it. The argument resolves itself into this. Is that section of the provincial Act inconsistent with the general Act of 1906? Their Lordships cannot think that it is. The requirement to run a third-class train may be incompatible with the Canadian practice, but it is an unrepealed part of the section of the provincial Act. It may be inconsistent with business or other conveniences, but no argument has been urged to shew that it is inconsistent with the later Act, and if it is not inconsistent why is not the portion which relates to tolls and third-class passengers also to stand? The company is to prepare

*Lords Loreburn, L.C., Macnaghten, Atkinson, Collins, Gorrell.

a tariff of tolls with reference to the statutory duties of the company, one of which is to be found in the third section of the Act of 1852. The result may be unfortunate, and the omission to repeal the third section may perhaps have been an oversight. Their Lordships cannot pronounce an opinion whether a section is continued by oversight or design; still less can they determine a case upon conjectures.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeal. The appellants will pay the respondent's costs as between solicitor and client in accordance with the undertaking given when special leave to appeal was granted.

Batten, Proffitt & Scott, solicitors for appellants.

Blake & Redden, solicitors for respondent.

NOTE: Affirming the judgments of the Board of Railway Commissioners and the Supreme Court of Canada reported respectively at 6 Can. Ry. Cas. 494, and 7 Can. Ry. Cas. 267.

JURISDICTION—RAILWAY CROSSING—PARTY INTERESTED.

COUNTY OF CARLETON V. CITY OF OTTAWA.

(41 S.C.R. 552.)

Board of Railway Commissioners—Jurisdiction—Railway crossing—Contribution to cost—Party interested—Municipality—Distance from work.

A municipality may be a "party interested" in works for the protection of a railway crossing over a highway though such works are neither within or immediately adjoining its bounds and the Board of Railway Commissioners has jurisdiction to order it to pay a portion of the cost of such work.

Present:—Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ.

APPEAL by leave of a Judge in Chambers as to the jurisdiction of the Board of Railway Commissioners to order the county of Carleton to contribute to the cost of a viaduct or overhead roadway over four railway crossings on Wellington Street in the city of Ottawa.

The county of Carleton originally joined with the city of Ottawa in applying to the Board for an order for this work.

Subsequently the village of Hintonburgh, in which the proposed viaduct would be situated was incorporated with the city, and the work, which had been within a few feet of the county boundary was then distant from it nearly a mile. The county, therefore, withdrew from the joint application and it was proceeded with by the city alone. The Board, however, held that the county was still a "party interested" and in granting the application ordered it to pay a portion of the cost. The county appealed to the Supreme Court of Canada challenging the jurisdiction of the Board to make such order.

R. V. Sinclair, K.C. and *D. H. McLean*, for the appellants.

McVeity, for the respondents, the city of Ottawa.

Ewart, K.C., for the Grand Trunk Railway Co.

W. L. Scott, for the Canadian Pacific Railway Co.

THE CHIEF JUSTICE and DUFF and ANGLIN, JJ., concurred in the judgment of Mr. Justice Davies.

April 5, 1909. DAVIES, J.:—The question on which leave to appeal was given in this case, from an order of the Board of Railway Commissioners directing the municipality of the county of Carleton to pay a proportion of the cost of certain protective works ordered at the crossing of the Richmond Road and the Canada Atlantic and other railways, was limited to the jurisdiction of the Board to make the order it did as against the municipality of the county of Carleton.

The ground upon which the jurisdiction was challenged was that, while the crossing in question was, at the time the application was made to the Board for such protective works, within a few hundred feet of the municipal boundary, subsequently, before the case came on for hearing and at the time the order was made, the area within which the crossing existed had been legally withdrawn for about a mile from the municipal boundary and the intervening territory brought within the city of Ottawa and, so, the proposed protective works were neither within the municipal bounds of the county or immediately adjoining them.

It was contended on behalf of the municipality that it could not be held to be an "interested party" within the meaning of the Railway Act with respect to protective works ordered by the Board at highway crossings which were not within the boundaries of the municipality, and the more so in a case such as the one before us where, it was contended, the highway was not vested in the municipality, but in a toll company.

All questions as to sections 186 and 187 of the Railway Act of 1903 being *intra vires* of the Parliament of Canada have been set at rest by the decision of this Court in the case of *The City of Toronto v. The Grand Trunk R.W. Co.*, 37 S.C.R. 232, and that of *Toronto Corporation v. The Canadian Pacific R.W. Co.*, [1908] A.C. 54, decided on appeal from the Court of Appeal for Ontario by the Judicial Committee of the Privy Council.

The powers of the Board of Railway Commissioners to order municipalities to pay a proportion of the cost of protective works ordered to be built at highway and railway crossings on railways within the jurisdiction of the Dominion Parliament so far as these crossings were within the municipal bounds or immediately adjoining them were, by these two cases, finally settled against the municipality.

In the latter case, decided by the Judicial Committee of the Privy Council, two of the crossings there in question were over a railway, the southern boundary of which was the northern boundary of the city of Toronto and so outside of but immediately adjoining the city boundaries.

The question raised in the case before us was whether a municipality was liable if the crossings where the works were ordered was beyond its bounds and not immediately adjoining them.

I am unable to discern any substantial reason for limiting the jurisdiction of the Board of Railway Commissioners in the manner suggested.

If that Board has jurisdiction to order a municipality to pay a proportion of the cost of any work ordered by it to be done at a railway and highway crossing in cases where that work is beyond the bounds of the municipality, even though adjoining it.

I fail to see why its jurisdiction should cease if the crossing happened not to adjoin, but to be a short distance beyond the municipal bounds.

The municipality was not an "interested party" within the provisions of the Railway Act and so liable to pay a share of the cost of the work at a railway and highway crossing simply because the crossing was within its bounds or "immediately adjoining" them, or because the municipality owned the highway crossing the railway or being crossed by it, but because the works ordered were, in the words of the statute, for the "protection, safety and convenience of the public" and such "as, under the circumstances, appeared to the Board best adapted to remove or diminish the danger or obstruction arising or likely to arise therefrom," and because the Board found the inhabitants of the municipality specially interested in these protective works.

What Parliament was conferring on the Board were powers for the "protection, safety and convenience of the public" at the crossings, alike that portion of the public being carried by the railway and that portion using the highway.

The decision of the Board as to whether a municipality was or was not a party interested was made by the statute binding and conclusive. It is a question of fact to be determined upon all the circumstances of each case. The circumstance of a crossing where protective works were ordered being within or without the municipality might be or not be, under all the special circumstances of the case, most material to the decision of the fact whether or not the municipality was an interested party, but it was not, in itself, conclusive. Such a crossing might be within the boundaries of the municipality and yet its inhabitants be very slightly interested in the protective works ordered, or it might be just beyond the precincts of the municipality and yet so situated that a large number of the inhabitants of the municipality were vitally interested in the protective works ordered. In each case the question of fact and the amount of the municipality's contribution were to be determined by the Board.

The municipality represented its inhabitants; the works to be ordered were works for the "protection, safety and convenience" of such inhabitants as part of the public; and the degree and extent to which the municipality was to share the expense of the protective works determined on as necessary was to be decided by the Board. In all cases it was necessarily a question of fact to be decided in the light of all the circumstances and not necessarily dependent upon the arbitrary fact of the protective works being within or immediately adjoining the municipality.

Though not within the express terms of the decision of the Judicial Committee in the case above cited, of *Toronto Corporation v. The Canadian Pacific Railway Co.*, [1908] A.C. 54, this case is within the reasoning on which that judgment and also the judgment of this Court in the *City of Toronto v. The Grand Trunk Railway Co.*, 37 S.C.R. 232, above cited, were founded.

The following extract from the judgment of the Judicial Committee, as delivered by Lord Collins, shews, in part, the reasoning by which their Lordships reached the conclusions they did:—

"In the present case it seems quite clear to their Lordships that if, to use the language above quoted, 'the field were clear,' the sections impugned do no more than provide reasonable means for safeguarding, in the common interest, the public and the railway which is committed to the exclusive jurisdiction of the legislature which enacted them, and were, therefore *intra vires*. If the precautions ordered are reasonably necessary, it is obvious that they must be paid for, and, in the view of their Lordships, there is nothing *ultra vires* in the ancillary power conferred by the sections on the committee to make an equitable adjustment of the expenses among the persons interested. This legislation is clearly passed from a point of view more natural in a young and growing community interested in developing the resources of a vast territory as yet not fully settled than it could possibly be in the narrow and thickly populated area of such a country as England. To such a community it might well seem reason-

able that those who derived special advantage from the proximity of a railway might bear a special share of the expenses of safeguarding it. Both the substantive and the ancillary provisions are alike reasonable and *intra vires* of the Dominion Legislature, and, on the principles above cited, must prevail, even if there is legislation *intra vires* of the provincial legislature dealing with the same subject matter and in some sense inconsistent."

I think, therefore, the limitations upon the jurisdiction of the Board of Railway Commissioners sought to be put by the county of Carleton in this case are not maintainable and that the appeal must be dismissed with costs.

INDINGTON, J.:—I think this appeal should be dismissed with costs.

The power of the commission as to directing a municipal corporation to aid in protecting a railway company has been, ever since *The City of Toronto v. The Grand Trunk R.W. Co.*, 37 S.C.R. 232, was decided here, dependent entirely upon the finding of the commission as to whether or not any of the inhabitants of such municipality were interested.

The majority of the Court in that case held, as beyond doubt, that, if the inhabitants were interested, the corporation must be held so.

I had supposed, until then, that though the inhabitants had been incorporated, they and the corporation were not, in law, convertible terms, and that the latter could only represent the former so far as its legislative creator had determined it might.

I had also supposed that "municipal institutions" in a province, having as a subject matter been assigned by the British North America Act, 1867, to the legislature of the province, exclusively to make laws in relation to matters coming within such a subject so assigned, it was not competent for the Dominion Parliament either to add to such power as the creating legislature had seen fit to confer or, above all, to use these institutions for the purpose of levying taxes upon the inhabitants so incor-

porated when given no such power, merely to subserve the execution of any of the powers conferred on the Dominion.

I had supposed any such corporation, in respect of its property, whether of roads or aught else, might, as any other property owner, become, of necessity, subject in relation to such property to the will of Parliament lawfully empowering or directing railway construction and suggested a line might well be drawn for exercising the jurisdiction now in question to cover this property relation, as within the manifest interest of the corporation.

The opinions given by the other members of the Court left us no room for doubt that the line should not be so drawn or any line drawn save where Parliament saw fit to draw it.

The British North America Act, 1867, and the Railway Act so interpreted left the matter wholly to the Commissioners to find and say what municipal corporations were "interested" within such meaning as was thus assigned in the latter Act.

This case was upheld by the Judicial Committee of the Privy Council, and, later, *The Toronto Corporation v. The Canadian Pacific Railway Co.*, [1908] A.C. 54, not only carried quite logically (if I may be permitted to say so) the doctrine further than the former case; but also lays down so wide a principle of action to be applied that it is hard to see what appellants can have hoped to gain by thus flying in the face of judicial authority when armed only with nothing new but only such arguments as had proved of no weight in the highest Courts of law entitled to pass upon the matter.

Appeal dismissed with costs.

D. H. McLean, for the appellants.

Taylor McVeity, for the respondent the City of Ottawa.

W. H. Biggar, for the respondent the G. T. R.W. Co.

E. W. Beatty, for the respondent, the C. P. R.W. Co.

INSTALLATION OF TELEPHONES IN RAILWAY STATIONS.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

PEOPLES' AND CALEDON TELEPHONE COS. v. GRAND TRUNK AND
CANADIAN PACIFIC RY. COS.

(File Nos. 8762, 8883.)

Jurisdiction—Installation of telephones in railway stations—Public convenience—Exclusive contract—Provincial companies to be bound by contract—Fair and reasonable conditions—Railway Act, sec. 245.

Upon application to the Board by the P. and C. telephone companies for an order compelling certain railway companies to permit the installation and maintenance in railway stations of telephones,

Held, 1. That under sec. 245 of the Railway Act the Board has jurisdiction to grant the order applied for and may impose such terms as it deems best and expedient but should not take into consideration any contract giving exclusive privileges to any other telephone company.

2. That the only point to be considered by the Board is whether such telephone connection will be of benefit and convenience to the public having business with the railway company.

3. That telephone companies who may be entitled to such an order being usually incorporated by the province, and thus not subject to the jurisdiction of the Board should enter into a contract containing fair and reasonable conditions to be prescribed by the Board.

THE applications were heard at Ottawa on the 6th day of May, 1908, and on the 2nd days of February and March, 1909, and at Toronto on the 27th day of April, 1909.

W. H. Biggar, K.C., for the Grand Trunk Ry. Co.

Angus MacMurchy, K.C., and *E. W. Beatty*, for the Canadian Pacific Ry. Co.

J. W. Curry, K.C., for the applicants.

May 5, 1909. THE ASSISTANT CHIEF COMMISSIONER:—The Board has heard applications from the Peoples' Telephone Company and the Caledon Telephone Company, for an order to compel certain railway companies to permit the telephone companies to install their instruments in a number of railway stations. Under section 245 of the Railway Act, the Board may grant such an order, and may impose such terms as it deems just and expedient; but in determining them, shall not take

into consideration any contract giving exclusive or other privileges to any other telephone company by the railway company, with regard to the installation or maintenance in its stations of the instruments of such telephone company.

The only points to be considered then are whether such telephonic connection will be of public benefit, and if so, what terms should be imposed on the telephone company seeking the privilege. It will be a saving of time if the Board lays down certain general principles upon which it will act when such applications come before it.

If the telephone company's instruments are in general use in the district surrounding the station in question, and it appears that the installation of a telephone in the station would be of substantial convenience to the public having business with the railway company, and would not be unduly oppressive or inconvenient to the railway company, then I think the Board should grant the application.

As nearly all telephone companies in Canada are incorporated by provincial laws, and are consequently not under the jurisdiction of the Board, difficulty might be experienced in compelling such a company to comply with the terms and conditions the Board might desire to impose, unless the company was bound to do so by contract.

I therefore suggest that, where the Board is of the opinion that the application of a telephone company for an order to compel a railway company to permit the installation of a telephone in its station should be granted, that before any order is issued, the telephone company be asked to execute an agreement in the following, or like form, in which I have set out fair and reasonable conditions upon which such order should be granted:

THIS AGREEMENT made the day of in the
year of Our Lord one thousand nine hundred and By
AND BETWEEN hereinafter called the "Rail-
way Company" of the First Part, AND herein-
after called the "Telephone Company" of the Second Part.

WHEREAS the Telephone Company is desirous of placing a telephone instrument in the station of the Railway Company at in the Province of

AND WHEREAS the Railway Company is willing to permit the said telephone instrument to be placed in its said station upon the terms and conditions hereinafter stated.

WITNESSETH, that in consideration of the premises, it is hereby agreed by and between the parties hereto, as follows:—

1. Upon the terms and conditions hereinafter stated, the railway company will permit the telephone company to install a telephone instrument in its said station, the telephone company to pay the railway company a rental of \$1 per annum for the privilege, to be paid on the first day of January in each year, during the continuance of this agreement.

2. The telephone instrument shall be placed and maintained at the said station without damage to the railway company's property, and entirely at the risk and expense of the telephone company, free from any rental or other charge to the railway company, and the telephone company will not seek to hold the railway company responsible for any damage to said instrument, no matter how such damage may occur.

3. The telephone company may erect and maintain such poles and wires on and across the lands of the railway company as may be necessary for the installation and operation of the said telephone instrument, provided that such poles shall be placed, and such wires strung, to the satisfaction, and under the supervision of a duly authorized official of the railway company, and at such places only as he shall designate.

4. The said telephone instrument shall be of the most modern and efficient type in use by the telephone company; it shall be a desk or wall instrument, whichever the railway company may desire; it shall be placed in such position in the said station as the railway company may indicate, and shall be connected by private wire with the central of the telephone company.

5. The railway company, its officials, agents and employees, shall have service from, to, and through the said telephone instrument with local and rural subscribers over the telephone lines of the telephone company, without charge therefor.

6. The telephone company may, with the approval of the Board of Railway Commissioners for Canada, remove its telephone instrument from the said station, and its poles and wires from the property of the railway company at any time upon giving the railway company 30 days' notice in writing of its intention so to do. All damage done to the property of the railway company in removing the said telephone instrument, poles and wires, shall be repaired by, and at the expense of the telephone company.

7. This agreement shall terminate at any time upon the order of the Board of Railway Commissioners for Canada, granted on the application of the railway company, or otherwise, and the telephone company will, at all times, carry out and obey any order of the said Board, with regard to the installation, maintenance, operation or removal, of the said telephone instruments, poles or wires, and hereby submits itself, in so far as this contract is concerned, to the jurisdiction of the said Board.

IN WITNESS WHEREOF the parties hereto have executed these presents.

Upon such an agreement being signed for each of the stations in which the telephone companies before us desire to install instruments, I think the order asked for should be issued.

My suggestions in this matter, apply only to cases where one or two telephone companies desire to put their instruments in a railway station; if a third or more companies desire the privilege, a special application should be made to the Board, otherwise a railway company might be put to much inconvenience.

The Chief Commissioner and Mr. Commissioner McLean concurred.

UNREASONABLE RATES.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

STOCKTON & MALLINSON V. CANADIAN PACIFIC RY. CO.

(Case No. 1212.)

Rates on citrus fruits from California—Competition of railways and markets in United States—Blanket rates—Local and proportional rates—Unreasonable rates—Discrimination—Fair and reasonable rates—New tariffs with connections in United States.

Complainants alleged that the rates charged by the respondents on shipments of citrus fruit from points in California, United States, to Regina were unreasonable as compared with the rates charged from the same points to Winnipeg and other points in Manitoba and Ontario.

At the time the complaint was heard the rate to Regina on citrus fruits via Kingsgate, British Columbia, was \$1.70 per 100 pounds made up of the full local rates in United States territory with a proportional rate over the Canadian Pacific Railway. Before the opening of the Kingsgate route the rate to Regina via Emerson and Winnipeg was \$1.72, when the Kingsgate route was opened this rate was reduced to \$1.60 via Kingsgate, and was afterwards raised to \$1.70.

On account of the competition of railways and markets in the United States the blanket rate to Missouri river common points from shipping points in California is \$1.15, and the rate to Winnipeg is \$1.25.

Held, 1. That the advantage in rates of Winnipeg over Regina is not unreasonable.

2. That the former rate of \$1.60 to Regina was fair and reasonable and should be restored.
3. That the respondents should be required to arrange for the publication of new tariffs with its connections from California shipping points to Regina via Kingsgate or Emerson on basis of \$1.60 per 100 pounds on oranges in straight carloads, or on mixed carloads of oranges and lemons, and \$1.45 per 100 pounds on lemons in straight carloads.

THE application was heard at Regina on the 11th day of February, 1909.

Mr. Mallinson, the applicant, in person.

Mr. W. H. Curle, for the Canadian Pacific Railway Company.

The facts are fully set out in the judgment of Mr. Commissioner McLean.

April 26, 1909. MR. COMMISSIONER McLEAN:—That applicants are fruit and produce merchants in the city of Regina. The

present rate from Los Angeles to Regina is \$1.70 per 100 pounds on citrus fruits of all kinds. This fruit is routed over the Southern Pacific or Sante Fe, the Oregon Railway and Navigation Company, and Spokane International, to Kingsgate, British Columbia, and thence by the Canadian Pacific to destination. The rate is made up as follows:—

Los Angeles to Portland, Oregon.....	53c.
Portland, Oregon, to Kingsgate, B.C....	57c.
Canadian Pacific	60c.

\$1.70

The rates in United States territory are full locals, while the Canadian Pacific rate is a proportional one. On shipments from Riverside and Redlands, the rates are respectively $2\frac{1}{2}$ c. and 5c. higher. Regina has the same rate as Moose Jaw.

The rate on oranges in straight carloads to Winnipeg, a longer distance point, is \$1.25 per 100 pounds. The same rates apply on oranges and lemons in mixed carloads. On straight carloads of lemons, the rate is \$1.10. These rates have been in force since November, 1907. On shipments to Winnipeg the competition of railways in the United States has to be met. As a result of competition, compromise and consideration of the best methods of meeting the demand for citrus fruits in the large markets of the United States the practice has developed of making blanket rates of \$1.15 on oranges and \$1.00 on lemons, both in straight carloads, to points in the United States east of the Missouri and Mississippi River gateways. This applies to Detroit, Buffalo, New York, Boston, and common points. This also affects points in Canada. Toronto, for instance, having the advantage of the Buffalo rate.

It is apparent that whatever rate is fixed by the competition of railways and of markets to points in United States territory south of Winnipeg must be recognized by the Canadian Pacific in making rates to that point. It is contended by the

applicants, that the same rates should apply to Regina via Kingsgate, as apply to Winnipeg via its connection through Emerson with the United States transcontinental lines. Winnipeg, Portage la Prairie, and Brandon, are terminal points in the territory known, under the transcontinental freight tariffs, as Missouri River common points. The Winnipeg rate is 10c. higher than to Missouri River common points. The reason for this is, that the connecting lines south of Minnesota transfer (St. Paul) will not so reduce their portions of the total rate as to give the northern lines what they consider a fair return of the rate if the rate of \$1.15 is charged. Out of the total rate of \$1.25 on oranges to Winnipeg the lines north of Minnesota transfer to the international boundary receive 38.8c. per hundred pounds, while the lines north of the boundary receive 12 1/3c. per hundred.

In November, 1906, the new route via Kingsgate was opened. During the first season of operation of this route, the Canadian Pacific made the same rate to Winnipeg via Kingsgate as via Emerson. On account of the inadequate revenue obtained from this experiment in meeting a competitive rate, the small amount of tonnage moved by it, and the difficulties in the way of prompt delivery on account of climatic conditions, the rate was cancelled at the end of the season.

It is apparent that different factors enter into the rate situation at Winnipeg and the territory adjacent thereto, from these existing at Regina. The large volume of citrus fruits moving over the United States lines, and the large market to which this line of product caters in the United States has developed a low rate basis which gives Winnipeg a rate advantage over Regina; but the circumstances are so dissimilar that the advantage is not an undue one. The further fact that the Canadian Pacific no longer quotes the compelled Winnipeg rate over its route from Kingsgate, relieves it from a charge of violating the long and short haul clause by charging higher rates to intermediate points.

The Regina rate complaint must be considered not from the standpoint of discrimination, but of reasonableness.

Before the opening of the route via Kingsgate, the orange rate to Regina based on Winnipeg, was \$1.72 per 100 pounds. The rate via Winnipeg is still operative. With the opening of the Kingsgate route the rate was reduced to \$1.60. This rate was in force from June 5th, 1907, until February 10th, 1908. It is alleged that this was changed to the present basis, because it was out of proportion with the Calgary rate of \$1.65.

It is a well-established principle that when a lower rate—which has been in force for some time—is replaced by a higher rate, the former lower rate is *primâ facie* a profitable and reasonable one. It is of course open to the railway to adduce evidence to shew that the former rate was an unprofitable one, and such evidence should be most carefully considered. But in the application before us, no such evidence has been adduced to shew that the rate of \$1.60 was unprofitable.

In addition to this, Mr. Peters, then assistant freight traffic manager of the Canadian Pacific Railway, made the affirmative statement, under date of January 20th, 1908, when an earlier application in this matter was before us, that the rate of \$1.60 was fair and reasonable. I see no reason why any departure should be made from this position now. At present the rate to Regina, via the Emerson gateway, is \$1.72, which is made up of the \$1.25 rate plus the 3rd class rate of 63 cents, Winnipeg to Regina, less the Winnipeg cartage, which is not performed. On the citrus tonnage moving via Kingsgate to Regina the Canadian Pacific is at present receiving 182 cents per ton per mile. The route from Kingsgate to Regina presents more difficult features from an operating standpoint, than that from Winnipeg to Regina. If then, the citrus fruits are routed to Regina via Winnipeg, it would appear fair to apply a rate on the Winnipeg to Regina haul not exceeding that earned per ton per mile on the Kingsgate-Regina haul, and making the rate via Winnipeg \$1.60.

The rate on lemons, which is also involved in the complaint, should be lined up with the rate practice, whereby lemons in straight carloads are given a lower rate than oranges.

I am of opinion, that the Canadian Pacific Railway should be required to arrange with its connections for the publication of new tariffs on the basis of \$1.60 per 100 pounds from Los Angeles points to Regina, via Kingsgate or Emerson, on oranges in straight carloads, or on mixed carloads of oranges and lemons, as well as a rate of \$1.45 on lemons in straight carloads.

The Chief Commissioner concurred.

TELEGRAPH TOLLS.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

**TIMES PUBLISHING CO. v. CANADIAN PACIFIC RY. CO., GREAT
NORTH WESTERN & WESTERN UNION TELEGRAPH COS.**

(File No. 10078.)

*Telegraph tolls—Marconi wireless system—Press and private messages—
Excessive and discriminatory rates.*

An application was made to the Board for an order directing certain telegraph companies to transmit press messages to the Marconi wireless station at Glace Bay at the same rate as to other points along the Atlantic coast of Canada from the City of Ottawa.

It was alleged that the rates were excessive and discriminatory because the telegraph companies on messages to Glace Bay charged the higher private rate rather than the lower press rate.

Held, that the evidence did not establish that excessive or discriminatory rates were charged, the rates being lower from Ottawa to Glace Bay than from the same point to other Canadian Atlantic coast points and the application must be dismissed.

THIS application was heard at Ottawa on the 18th day of May, 1909.

R. G. Code, K.C., for the applicant.

E. W. Beatty, for the Canadian Pacific Railway Telegraph System.

J. N. Greenshields, K.C., and F. H. Markey, K.C., for the Great North Western and Western Union Telegraph Companies.

The facts are fully set out in the judgment of the Chief Commissioner.

May 19, 1909. THE CHIEF COMMISSIONER:—In this case that was heard yesterday of the Times Publishing Company against the three telegraph companies mentioned in the complaint, we have come to the conclusion that there is not sufficient information before the Board upon which we would be justified in granting the order that is asked for by the applicants.

They desire an order that the Canadian Pacific Telegraph Company, the Great North Western Telegraph Company and the Western Union Telegraph Company transmit press messages to the Marconi wireless station at Glace Bay at the same rate as is charged to other points along the Atlantic coast of Canada. They allege that while the usual rate on press messages from Ottawa to Canadian Atlantic coast points is 35 cents per 100 words at night, and 50 cents per 100 words in the day time, the telegraph companies charge private message rate on all press messages to Glace Bay intended for transmission by Marconi wireless, and that these charges are excessive and discriminatory.

Now, it appears from what took place in the discussion yesterday that there is in fact as between the cable companies on the one hand and the Marconi system on the other, no discrimination in favour of the former or against the latter. On the other hand it seems that under the existing rates as charged, the sender of a message via Glace Bay over the Marconi system, as a matter of fact pays some twenty cents or thirty cents less to the land line for delivering at Glace Bay to the Marconi system, than the same sender would be required to pay to the cable company, as the share that the cable company under its existing contract with the land line would pay to the land line for the delivery of a message of the like number of words to the

cable company at the coast. So that, instead of the existing charges being discriminatory, and in favour of the cable companies as against the Marconi system, the facts are otherwise.

It is not necessary at the present moment to deal with the larger question that was discussed by counsel as to the system now in operation being alleged to be discriminatory in favour of the American press as against the press of Great Britain or the transatlantic press.

The counsel who appeared in the case suggested that this latter matter should stand over until the larger questions of telegraph communication generally and the rates as applicable thereto were considered by the Board, and in view of there being no sufficient information before us to deal intelligently with this application now, we think that is perhaps the better disposition to make of that matter in the meantime.

The attempt here is really to extend the existing system which was voluntarily established by the telegraph companies as to press rates. They have an extremely low rate apparently throughout Canada, and with their connecting lines throughout the United States for press purposes. These rates are applicable, or intended to be applicable in so far as Canada is concerned, to that class of business that is addressed to newspapers, for publication in the various towns and cities and villages in the Dominion. There is a press rate to Glace Bay. It is said there is a newspaper there, and so I presume that from other parts of Canada the press rates would apply to the publisher of that newspaper at Glace Bay. The attempt here is to have the Board extend, against the will of the telegraph companies, this system of reduced rates for press purposes, in this particular instance, to the *London Times* published in London, England. Now, we have no information whatever as to the reasons that moved the telegraph companies to establish these low press rates. We have no information whatever as to the profit of the telegraph companies, as to whether these rates are fairly remunerative or not, and we have no information as to the vol-

ume of business of that class. All this information would be necessary to enable the Board to say whether or not it was a fair thing to require the telegraph companies to give to newspapers published on the other side of the Atlantic, rates upon a like basis. It was said that press rates could not apply reasonably to cable messages by reason of their being so condensed and so on, and that there was, in some instances, greater expense imposed upon the telegraph companies by reason of their being required to have operators in the cable offices. All these matters would have to be inquired into carefully before we could deal intelligently with the case, and say whether or not transatlantic press rates should be upon the same basis as domestic press rates. This may be a matter that will be developed when the telegraph rates are looked into as they probably will have to be before very long. All that I have said, is of course, quite apart from the question of jurisdiction that counsel raised, as to which in the meantime it will not be necessary for us to say anything. That feature of it may be deferred for consideration when the balance of the complaint is more fully developed, so that we can dispose of it in a manner that we are unable to at present.

JURISDICTION—EXPRESS COMPANIES.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

CANADIAN AND DOMINION EXPRESS COS. v. COMMERCIAL ACETYLENE Co.

(File No. 8801.)

Jurisdiction—Express companies — Dangerous commodities — Refusal to carry—Discretion—Railway Act, secs. 317, 348-354.

Application to the Board for an order directing the express companies operating in Canada to receive and carry a certain commodity.

The express companies contended that the Board had no jurisdiction to order them to carry any class of commodity and refused to carry the said commodity because it was dangerous and liable to explode.

Held, under the relevant provisions of the Railway Act, secs. 317, 348-354, express companies are at liberty to exercise their own discretion in refusing to carry by express any particular commodity.

THIS application was heard at Ottawa on the 18th day of May, 1909.

Frank Arnoldi, K.C., for the applicant.

F. H. Chrysler, K.C., for the Dominion Express Co.

W. H. Biggar, K.C., for the Canadian Express Co.

The facts are fully set out in the judgment of the Chief Commissioner.

May 20, 1909. THE CHIEF COMMISSIONER:—The applicants ask for an order compelling the express companies operating in Canada to accept and carry a commodity manufactured by them, consisting of gas absorbed in asbestos encased in copper or metal tanks. The companies have refused to carry these tanks upon the ground that they are dangerous, or liable to explode, but in the view we take of the matter it is not necessary to deal with the validity of these objections, or with the nature of the contracts between the express companies and the railway companies.

The fundamental question is whether the Board has power to require express companies to carry any class of commodity they object to, or refuse to accept.

The group of clauses from section 348 to 354 of the Railway Act are, with section 317, sub-section 6 and section 2, sub-section 9, the provisions relating to express companies, and shew the control that Parliament has conferred upon the Board over them. Is there anything in these sections that empowers the Board to require these companies to grant the applicants' request? The main group of clauses is headed "*Express Tolls*" and generally speaking they refer chiefly to tariffs, and conditions and contracts limiting liability for carriage, and as to these matters all the provisions of the Act relating to freight tolls and tariffs, so far as applicable, are to apply to express companies.

Section 352 provides that the Board may by regulation, or in any particular case, prescribe what is carriage or transportation of goods by express.

Section 353, sub-section 3(b) provides that the Board may in any case or by regulation "*prescribe the terms and conditions under which goods may be collected, received, cared for or handled for the purpose of sending, carrying, or transporting them by express, or under which goods may be sent, carried, transported or delivered by express by any such company, person or corporation,*" and it was upon this section that the principal argument was based in support of the Board's jurisdiction. It does not seem to us that this can fairly be read to mean more than that when an express company decided to carry any particular class of goods, the Board may prescribe the terms and conditions under which the collection, receipt, care for and handling of the same shall take place, and this view is strengthened when this clause is found among a group of sections that do not seem to be dealing with anything except tariffs, tolls and contracts or conditions limiting liability.

The "*terms and conditions*" governing the collection, receipt and handling of goods that the Board might deem proper to impose under this sub-section, relate to the extent to which liability may be impaired, restricted or limited under sub-section 3(a).

The Act does not confer upon the Board as wide jurisdiction over express companies as it does over railway companies, and of course jurisdiction is limited to such matters that the Act plainly and clearly covers. There should be no straining after jurisdiction, and as we read this clause it is limited as above indicated.

It was also argued that section 333(1) gave jurisdiction, but we think this relates only to contracts "*limiting liability*" after a company has decided to accept or collect for carriage any particular commodity.

Whether it was the intention of Parliament to limit the control of express companies to tariffs, tolls, conditions and contracts or not, it seems to us the above is the only fair reading of the Act, and we are of opinion that express companies are at

liberty to exercise their own discretion in refusing to carry by express any particular commodity.

The Assistant Chief Commissioner and Mr. Commissioner McLean concurred.

INTERSWITCHING CHARGES.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

ANCHOR ELEVATOR & WAREHOUSING AND NORTHERN ELEVATOR
COS. v. CANADIAN NORTHERN AND CANADIAN PACIFIC RY. COS.

(Case No. 9816.)

*Interswitching charges—Excessive—Through rate and balance thereof—
Stop-over privilege—Absorption of interswitching tolls—Intermediate and
terminal points—Tolls, reasonable or otherwise—Tariffs to be filed—
Delivery in transit—Refund.*

Upon a complaint to the Board that excessive interswitching charges were made by the Canadian Pacific Ry. Co. for the transfer of cars from the line of the Canadian Northern Ry. Co. to the elevators of the complainants.

The complaints arose with reference to traffic originating upon the lines of the Canadian Northern to be carried by them at a through rate to Fort William or Port Arthur when delivered in transit to the elevators of the complainants upon the stop-over privilege of 1 cent per 100 pounds.

Held, 1. That the interswitching order of July 8th, 1908, did not apply, that the charge of \$5.00 per car made by the Canadian Pacific for interswitching was reasonable, and tariffs should be filed accordingly.

2. That the Canadian Northern could not be called upon to absorb any of this charge, the provisions of the interswitching order of July 8th, 1908, only applying to terminal and not to intermediate points.

3. That refunds in excess of the charge of \$5.00 already paid could not be directed, the railway companies charging the tolls called for in their tariff.

Canadian Manufacturers' Association v. Canadian Freight Association (Joint Switching Rates Case), 7 Can. Ry. Cas. 302, distinguished.

THE application was heard at Winnipeg on February 6th, 1909.

W. Bawlf, for the applicants' manager.

O. H. Clarke, K.C., for the Canadian Northern Ry. Co.

W. H. Curle, for the Canadian Pacific Ry. Co.

The facts are fully set out in the judgment of the Chief Commissioner.

March 31, 1909. **THE CHIEF COMMISSIONER:**—The elevators of the applicants are located upon the lines of the Canadian Pacific Railway Company at Winnipeg, and their complaints allege excessive charges made by that company for switching services rendered to the Canadian Northern Railway Company for the movement of cars arriving by the latter line at the St. Boniface transfer track, to the applicants' elevators some three miles distant. The complaints arise with reference to traffic originating at points upon the lines of the Canadian Northern and destined to Fort William or Port Arthur, and which takes the through rate, but is required by applicants for delivery at their elevators in transit upon the stop-over privilege of 1 cent per 100 lbs.

Prior to the general interswitching order of July 8th, 1908, the charge made by the Canadian Pacific Railway Company for the services in question was \$5.00 per car, and since that order the charge has been 1 cent per 100 lbs. in and out, so while the applicants formerly paid \$10.00 they now pay \$12.00 upon a 60,000 lb. car.

The applicants are under the impression that the Canadian Northern Railway Company should be required to absorb some portion of this toll, and that the order of July 8th applied to the class of service here in question.

When the provisions of that order were being considered, there was no intention that it should apply, except at terminals, and it was never intended to have application to movements required to enable milling in transit upon a through rate. The initial carrier becomes entitled to the extra, 1 cent per 100 lbs. above the through rate for the services performed upon its own line, delay in releasing its cars and the like, afterward receiving the grain or product for transmission to its destination at the balance of the through rate. The 1 cent was regarded as a reasonable toll for these privileges to the shippers, and it would not be fair to require that carrier to absorb a portion of a switching service performed by an intermediate carrier that might not only dissipate the 1 cent per 100 lbs. but also the balance of the through rate.

In the case in hand, the Canadian Northern is required to carry the grain in question, or its product, on to its destination, after being cleaned or ground at Winnipeg, at the balance of the through rate, and it does not seem reasonable that the 1 cent per 100 lbs. it receives for the stop-over privilege it grants should be encroached upon for the purpose of assisting in the payment of a switching charge made by the Canadian Pacific Railway Company for the convenience of the applicants and rendered necessary by reason of their elevators not being on the lines of the Canadian Northern; at any rate it was not present to the mind of the Board that the order of July 8th should apply to such a situation. Winnipeg is not the terminal point to which the grain in question is shipped. The terminal, or point of destination is the lake port to which the grain in question is shipped. It is an intermediate point only. The terminal, or point of destination is the lake port to which the shipment moves upon a through rate.

The interswitching order provides 20 cents per ton as a reasonable toll with \$3.00 minimum and \$8.00 maximum. These figures were not established as being applicable to the class of service at an intermediate point in connection with traffic that is not joint, but were fixed at what might as all round be regarded reasonable when applied to all carriers performing switching services in order to make delivery at terminal points, and the Board is of opinion that tolls for services performed by an intermediate carrier to enable the shipper to enjoy stop-over privileges must be determined as reasonable or otherwise quite apart from the provisions of the interswitching order.

The Canadian Pacific Railway was represented by counsel at the hearing, and the Board had the advantage of hearing the views of its representatives. No evidence was given of the cost of the service in question, or otherwise.

The Canadian Pacific tariff of 1904 provides for a charge of \$3.00 for the service in question. Subsequent tariffs fix the toll at 1 cent per 100 lbs. minimum of \$5.00, and this latter is the sum that was charged prior to the order of July 8th. The pro-

visions of that order not being applicable to this service, the charge should not have been made upon the basis provided for in it, but the company should have continued the tolls exacted before its issue. The \$5.00 charge may be regarded as reasonable and tariffs should be filed accordingly. Refunds in excess of the \$5.00 already paid cannot be directed, as strictly speaking the companies charged the tolls called for by their tariff, although why they were not imposed before the making of the interswitching order did not appear.

The Canadian Pacific Railway Company should be added as a party respondent.

Mr. Commissioner McLean concurred.

JOINT TARIFF—FOREIGN CARRIER.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

BRITISH AMERICAN OIL CO. V. GRAND TRUNK RY. CO.

(File No. 7529.)

Classification—"Exception"—Joint tariff—Continuous route—Through rate—Local or special commodity rates—Excessive rates—Foreign and Canadian carriers—Refund—Railway Act, secs. 317, 321, sub-secs. 2, 3, 4, 323, 333, 334, 336, 338.

An application was made to the Board under the foregoing sections of the Railway Act, to ascertain the legal rate on crude oil from Stoy, Indiana, to Toronto.

The Indianapolis Southern Railway Company, on whose line Stoy is a station, filed with the Board on December 19th, 1906, a joint tariff making the joint fifth class rate twenty cents per hundred pounds from Stoy to Toronto.

Prior to January 1st, 1907, crude oil had no classification, but on that date the official classification coming into force in the United States placed it in the fifth class, this classification being used by the Grand Trunk Railway Company.

Prior, however, to the coming into force of this classification the Grand Trunk Railway Company on November 30th, 1906, issued and filed with the Board an "exception" refusing to honour on petroleum and its products the fifth class rate from points in the United States to points in Canada, and provided that on such traffic from frontier or junction points the local or special commodity rates would govern.

The Grand Trunk Railway Company admitted that the joint rate was not unreasonable or unprofitable to them and that the local rate was intentionally made excessive to keep out oil from the United States.

- Held*, 1. That the "exception" filed by the Grand Trunk Railway Company had no effect and the procedure provided by the Railway Act, sec. 338 must govern.
2. That if a railway company in the United States without the approval of the connecting carrier in Canada files a joint tariff in which the latter does not desire to participate, the Canadian company should apply under sec. 338 to have it disallowed, and if this is not done, then the tolls provided in such joint tariff are the only tolls that can be charged until such tariff is superseded or disallowed by the Board.
 3. That if the Canadian Railway Company desires any change to be made in any classification used in the United States for such joint tariff, it should apply under sub-sec. 4, sec. 321.
 4. That the legal rate chargeable on the shipments in question is twenty cents per hundred pounds and that the Grand Trunk Railway Company should be at liberty to refund the difference between such rate and the sum collected by it.

THIS application was heard at Ottawa on the 6th day of April, 1909.

W. N. Tilley, for the applicant. The Grand Trunk Railway Company filed with the Board a general consent to the joint freight tariff in question giving a rate of twenty cents per hundred pounds on petroleum and its products, issued and filed with the Board by the Indianapolis Southern Railway Company.

The railway company adopted the said joint tariff by accepting and carrying the shipments in question at the said rate.

Supplement "A." to the official classification is relied on as an exception to the joint tariff.

This supplement has no such effect, being an exception to the classification only, was issued before the joint tariff and should have been after, and is not mentioned among the exceptions on the face of the tariff. Under the provisions of sections 336 and 338 of the Railway Act the joint tariff is valid and binding until superseded or disallowed by the Board, which has not done so.

The Board should order the railway company to refund all excesses of payments above twenty cents with interest from the time of payment.

W. H. Biggar, K.C., for the Grand Trunk Railway Company. The railway company did not at any time concur in the said joint tariff, or charge the rates named therein on petroleum and its products.

The rates named in the tariff are not effective to points on the railway in Canada inasmuch as under the Interstate Commerce Act concurrence therein must be given and duly filed.

The notation on the face of the tariff did not mean that fourth class rates did not apply and that fifth class did on shipments to Canada, but that the rates mentioned in the tariff were not to apply to such shipments.

The Indianapolis Southern Railway Company could not by the filing with the Board of such a tariff in any way affect an exception previously filed by the Grand Trunk.

The intention of Parliament as expressed in section 336 of the Railway Act was that the Board should be apprised of the filing of any joint tariff agreed upon between a foreign and Canadian carrier, and the rates to be charged thereunder. No jurisdiction as in section 334 is given the Board to require railway companies to enter into joint tariffs on foreign business.

Where no joint tariffs have been agreed upon, the only lawful through rate is the sum of the locals.

See decisions under Interstate Commerce Act, under the exception "Assent of connecting carrier necessary to establishment of joint rate": *In re Clark*, 3 I.C.C. Rep. 649, 2 I.C. Rep. 797; *New York, New Haven & Hartford Ry. Co. v. Platt*, 7 I.C.C. Rep. 323; *Receivers of New York & New England Ry. Co.*, 7 I.C.C. Rep. 323; *In re Form and Contents of Rate Schedules, and Authority for Making and Filing Joint Tariffs*, 6 I.C.C. Rep. 267, at p. 279, 4 I.C. Rep. 698; *Board of Trade of Troy v. Alabama Midland Ry. Co.*, 6 I.C.C. Rep. 1, at pp. 6, 7 and 8.

The facts are fully set out in the judgment of the Chief Commissioner.

May 19, 1909. THE CHIEF COMMISSIONER:—All railway companies are compelled to furnish to other companies and persons reasonable and proper facilities for forwarding, interchanging and delivering traffic, and the law declares that such facilities shall include, at the request of any other company,

or of any person interested in through traffic, the receiving, forwarding and delivering of through traffic, in the case of goods shipped by carload, of the car with the goods therein, at a *through rate* (section 317).

Where traffic is carried from any point in the United States to any point in Canada, by any continuous route, owned or operated by any two or more companies, whether Canadian or foreign, a *joint tariff* for such continuous route shall be duly filed with the Board (section 336). When such a joint tariff is filed, the companies affected must charge the tolls specified therein, until it is *superseded* or *disallowed* by the Board, and the Board may require to be informed by the company of the proportion of the toll or tolls in any joint tariff filed, which it or any other company, whether Canadian or foreign, is to receive or has received (section 338).

When traffic passes over any continuous route *in Canada*, operated by two or more companies, the several companies may agree upon a joint tariff for such continuous route, the initial company being required to file with the Board, and the other company or companies must promptly notify the Board of its or their assent and concurrence in such joint tariff, and if the companies are unable to agree upon such joint tariff, the Board, upon the application of any company or person desiring to forward traffic over such continuous route, which the Board considered a reasonable and practicable route, may require the companies to agree upon and file such joint tariff, or may determine the route, fix the tolls, and apportion the same among the companies interested. Where the companies have agreed upon the route and the through rate, but are unable to agree upon the division of the latter; the Board may apportion such through rate (sections 333 and 334).

The Board may disallow any tariff, or any portion thereof, which it considers unreasonable or unjust, or may prescribe other tolls in lieu of the tolls so disallowed, and any tariff (ex-

cept standard tariffs) may be amended or supplemented (section 323).

Any freight classification in use in the United States may, subject to any order or direction of the Board, be used by the company with respect to traffic to and from the United States (section 321, sub-section 4).

The foregoing provisions of the Railway Act seem to be the ones applicable to the present enquiry, which is one set on foot by the applicant company with the view of endeavouring to ascertain what the legal rate was upon crude oil in tank cars from Stoy, Indiana, to Toronto, at the dates mentioned later on.

Stoy is a station on the Indianapolis Southern Railway, and on December 19th, 1906, the railway company issued and filed with the Board a joint tariff (C.R.C. No. A3) making the joint fifth class rate twenty cents from Stoy to Toronto.

Prior to January 1st, 1907, crude oil had no classification, but upon that date Official Classification No. 29 came into effect, which placed crude oil in the fifth class. This was a classification in use in the United States, and has been and is being used by the Grand Trunk Railway Company, as it had the right to do, pursuant to the provisions of section 321, sub-section 4. Prior, however, to the coming into force of this classification, and on November 30th, 1906, effective January 1st, 1907, the Grand Trunk Railway Company issued and filed with the Board an *exception* as follows:—

“The Grand Trunk Railway Company will not honour, on petroleum and its products when shipped from points in the United States to points in Canada, the classification ratings shewn in Official Classification No. 29, effective January 1st, 1907. On such traffic the local or special commodity rates of the Grand Trunk Railway Company, in effect from the frontier or junction points will govern.”

Tariff (C.R.C. No. A3) above referred to, and filed December 19th, 1906, provided for its becoming effective January 20th, 1907, and was based upon the official classification above re-

ferred to, and upon its coming into effect crude oil moving from Stoy to Toronto would take, under the classification, the fifth class rate of twenty cents.

The first question that presents itself is whether this tariff, as affecting crude oil destined to points in Canada, took effect in spite of the *exception* to the classification filed by the Grand Trunk Railway Company. The Act makes no provision for the procedure adopted by the Grand Trunk Railway Company in filing this *exception*, and we are of opinion that it in no way destroyed the classification in whole or in part, and that upon its becoming effective, it did so in its entirety.

The railway company also filed with the Interstate Commerce Commission a like *exception* to this classification, but we think whatever effect that may have had in the United States, it can have none here. The procedure provided by the Railway Act must govern.

Tariff (C.R.C. No. A3) filed by the Indianapolis Southern Railway Company was in compliance with section 336 of the Act, being a joint tariff for the continuous route from Stoy to Toronto. Reading the classification and the tariff together, in so far as Canada is concerned, the legal rate established would be twenty cents, unless the *exception* of the Grand Trunk Railway Company had the effect of destroying the classification as to crude oil when destined to points in Canada, and as no provision is made for such step, or result, no such effect could have been accomplished. Any other practice must lead to endless confusion. We cannot introduce here, or follow the practice established in the United States regarding *exceptions* to classification; the practice there is necessitated by reason of the Interstate Commerce Commission not having the control over classifications that Parliament has conferred upon this Board. Power is given to prescribe or authorize any classification the Board deems proper, and once authorized, it cannot be varied except with the Board's approval. The only attempt made here to vary

the classification was with respect to petroleum and its products, *when destined to points in Canada*. The reason given for this attempt was not that the joint rate covered by the joint tariff was unreasonable or unprofitable to respondents. It was admitted that the local attempted to be established in the place of the share of the joint rate was excessive, and intentionally so. It was established, so it was stated in evidence, "to keep out American oil by putting up these rates." This is illegal, so we have an attempt to introduce a procedure not provided by the Act, in order to bring about a state of affairs that is in violation of the Act.

No exception was taken to this classification, except when the shipment was destined to a point in Canada. Oil could move from Windsor or Sarnia over the Grand Trunk Railway to Buffalo at the rate covered by the tariff and under the classification in question; but to intermediate points in Canada, over the same route, higher rates are attempted to be enforced, thereby discriminating against the Canadian consignee. Such result should not be permitted unless the respondents are entirely within the provisions of Canadian law.

No order of the Board respecting this classification has ever been made under sub-section 4 of section 321, it was and is being voluntarily used by the respondents.

It is open to the Board under the words, "*subject to any order or direction of the Board,*" to permit a variation from the classification with respect to traffic to and from the United States, but such variation would require to be reasonable and proper; and to permit the attempted variation by reason of the filing of the *exception* referred to would, we think, be granting something unreasonable and improper. We think all the provisions of section 321, sub-sections 2 and 3, apply to a classification used under the provisions of sub-section 4.

"*The freight classification in use in the United States*" (sub-section 4 of section 321) under which this traffic moved was and is the official classification.

The *exception* filed by the respondents had no reference to this classification in so far as it was *in use in the United States*. It was only as to petroleum and its products, so far as it might be applied to Canada. The *exception* applied only to "frontier" or junction points. So giving effect to the argument of respondents would have the result that filing an *exception* relating to Canadian traffic only, at Washington, would from time to time change this classification, so far as it was used in Canada, no matter whether such an *exception* were filed with this Board or not.

In July, 1907, the applicant company located in Toronto and entered into contracts with dealers in crude oil at Stoy, extending over a period of years.

The president of the applicant company states in evidence that he was verbally assured by a representative or representatives of the Indianapolis Southern Railway Company that there was a fifth class (Official Classification) through rate of twenty cents on petroleum, etc., Stoy to Toronto, and that he was also supplied by the said railway company with a copy of its tariff B-58 (C.R.C. A3) which quoted the Grand Trunk as being a participant in through rates Stoy to Toronto. The shipments of the applicant company from Stoy began about September 1st, 1907. On September 18th, the president of the applicant company received a communication from the Illinois Central Railway, it in the meantime having obtained control of the Indianapolis Southern Railway Company, under date of September 14th, 1907, which stated that:—

"The Grand Trunk people have now positively advised us that we must cancel the fifth class rate of twenty cents per hundred pounds on oil to Toronto, and that the rate will have to be based on Detroit, fifteen cents to Detroit, seventeen and a half cents Detroit to Toronto, making through rate of thirty-two and a half cents."

Fifteen cars were received in Toronto between October 1st and November 5th, 1907. The Grand Trunk Railway Company

billed these fifteen cars at thirty-two and a half cents, but when its attention was directed to Indianapolis Southern Railway Company's Tariff B-58 (C.R.C. No. 3), the rate was changed by the respondents to twenty cents, and payment in accordance therewith was made by the applicant company. On cars reaching Toronto at a later date, the expense bill shewed a rate of thirty-two and a half cents. On these the applicant company proffered payment of the twenty cent rate. The Grand Trunk Railway Company refused to release these cars except on payment of the thirty-two and a half cent rate, and a little later billed the applicant company for an alleged undercharge of twelve and a half cents on the shipment of the first fifteen cars. The applicant company contends that twenty cents is the legal rate and that there should be a refund of the difference between the thirty-two and a half cent rate and the twenty cent rate, as well as of certain demurrage claims which had to be paid in order to obtain the release of the cars on which the thirty-two and a half cent rate had been charged.

On November 7th, 1907, the Indianapolis Southern Railway Company issued its joint tariff, effective December 9th, (C.R.C. No. A7), purporting to cover points in Canada, and naming the respondents as participating parties, the note to which is as follows: "The rates herein on petroleum and its products will not apply on shipments destined to points in Canada." Presumably this was an attempt to destroy the joint rate established by the tariff of January, 1907, as on December 3rd, 1907, that railway company wrote the applicant company as follows:—

"We would not have cancelled the fifth class rates had we not been required by the Canadian roads to do so, and should it be the desire of the Grand Trunk or the Canadian Pacific Railway to restore the fifth class basis, we would be perfectly willing to make the restoration."

No exceptions to the statements in this letter were taken by the respondents, so it is fair to infer that the attempt to displace the through rate was made at their instance.

We think, however, the filing of the last mentioned tariff had not the effect supposed; it could have no such effect without reading section 338 out of the Act, for by it upon a joint tariff being filed with the Board, the only tolls that can be charged are those specified therein "until such tariff is *superseded* or *disallowed* by the Board." Superseded means "supplanted" or "replaced," therefore, once a joint tariff is filed, unless it is disallowed, it remains in force until replaced by another joint tariff, and it is not open to the carrier filing it to destroy its effect by filing a supplement alleging that the sum of the locals shall be substituted for the joint through rate.

Upon the construction we feel compelled to place upon these sections, it would seem that the only legal rate from Stoy to Toronto upon the commodity since the beginning of 1907, is twenty cents. We are alive to the importance of this interpretation of the Act as it bears upon the classification, and the filing of a joint tariff by a foreign carrier. This holding will not have the effect of permitting the foreign road to fix the tolls of the Canadian carrier without its consent, or of imposing upon it a foreign classification in its entirety, if the Canadian road adopts any portion of it, as provision is made for both these contingences.

First, as to the joint tariff. If a foreign road, without the approval of the Canadian, files a joint tariff which the latter does not desire to participate in, its course is to apply to the Board, under section 338, to have it disallowed, and if this course is not taken, the tolls provided in such joint tariff become, by virtue of section 338, the only tolls that can be charged.

Second, as to the classification. If a Canadian carrier desires any variation or alteration in any classification used in the United States, owing to difference of circumstances in Canada, application may be made to the Board, under section 321, sub-section 4, for *any order or direction* with reference to such classification that might be thought proper.

In arriving at these conclusions, we are in no way overlooking the argument of Mr. Biggar, for the respondents, that the Board has no jurisdiction to require the foreign carrier to file a joint tariff. The difference in the Act between through traffic moving over domestic roads only, and the like traffic having its origin in the United States, destined to points in Canada, is very apparent, and necessarily so, because, of course, as to the latter traffic Parliament could not confer upon this Board any jurisdiction over the initial carrier, but no trouble arises here over this question as the initial carrier in the case in hand complied with the Railway Act, and filed the joint tariff, thereby placing upon the Canadian company affected the obligation of taking the step above indicated. Nor is the argument based upon the note on the face of tariff C.R.C. No. A3, viz., governed by "The Official Classification and exceptions thereto" being overlooked. Mr. Biggar says this is intended to convey the information that the rates shewn on page 209, tariff No. 806, are not to apply to points in Canada via the Grand Trunk Railway. We do not understand how this note could convey such information, and certainly the interpretation put upon tariff No. A3 by the Indianapolis Southern Railway Company itself, as indicated by its letters above set out, was not that now contended for.

The argument that because the Act to regulate commerce requires formal concurrence to be duly filed by participating roads to joint tariffs, and as no such concurrence was filed by the Grand Trunk Railway Company to this tariff with the Interstate Commerce Commission, it never bound the Grand Trunk Railway Company, can have no effect, because the Railway Act does not require such concurrence, except as to domestic traffic falling within section 333. It may be also noted that in the United States the only thing that has to be filed is "*such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission.*" Section 336 of the Railway Act, which gives rise to the trouble here, is silent as

to concurrence, but of course it is not to be assumed that any foreign railway company would file a joint tariff naming participating carriers, without, before filing, having obtained their concurrence, and if such were done, inadvertently or otherwise, under our Act, it seems the only course open to the objecting carrier would be to apply for its disallowance.

It is argued for the respondents that the whole blame for the tangle here should be placed upon the Indianapolis Southern Railway Company. We do not think so. On March 9th, 1905, the respondents filed with the Board a general concurrence in all joint tariffs which theretofore or thereafter might be issued by other carriers in which the Grand Trunk Railway Company might be named as a party, unless notice to the contrary should be given to the Commission. We do not, however, read this as applying to any joint tariff under section 336, but the filing of such general concurrence might be a convenient practice as to tariffs filed under section 333 to save the participating carriers the trouble of filing concurrence with each joint tariff as it was filed. But when traffic commenced to move under the tariff now in dispute, the respondents themselves supposed the tariff to be on foot, they billed and accepted payment of the first fifteen cars at twenty cents per hundred pounds. It is said this was a mistake, and when discovered, it was rectified. We are not told how or when it was discovered. These tariffs are intended for the guidance of shippers, and they are supposed to be able to ascertain from them what the lawful tolls are. Here we have a case of the applicant company making expenditures and entering into contracts upon the faith of the interpretation put upon the tariff by the initial carrier, traffic moving under the tariff as construed, and such construction adopted by the participating carrier, and then an attempt by the latter to set up an entirely different interpretation at the expense and possible ruination of the industry that attempted to use the tariff promulgated by these carriers.

The applicant company had nothing to do with the making or filing of these tariffs, and is in no way responsible for the confusion that has necessitated two long sittings, two oral and two written arguments, and all this to try to ascertain what the meaning is of all the documents that have been put upon the files of this Board and the Interstate Commerce Commission regarding this matter. Even if the position were left in doubt, it should be resolved in favour of the applicant company, who are in no way to blame for the situation, unless the attempt to ship crude oil into Canada is to be regarded as a blameworthy act.

We find that the legal toll chargeable upon the shipments in question was twenty cents per hundred pounds, and that that toll is still in force, and the respondents should be at liberty to refund the difference between that sum and the amount collected.

Before leaving the case, it is only proper to say that the respondents are entirely absolved of any intentional wrongdoing or violation of the law, and the difficulty has arisen by adopting a practice of attempting to shew non-concurrence, not provided for by the Railway Act.

The Assistant Chief Commissioner and Mr. Commissioner McLean concurred.

JOINT TARIFF—JURISDICTION.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

DAWSON BOARD OF TRADE V. WHITE PASS & YUKON RY. CO. ET AL.

(File No. 2030.)

Jurisdiction—Reasonable tolls—English, Canadian and foreign railway companies—Joint tariff—Filing with Board—Continuous route—Through traffic—Construction, operation—Control—Traffic by water—Foreign port—Railway Act, secs. 2 (21), 8 (b), 333 (3), 335, 336,—8 & 9 Edw. VII. ch. 32, sec. 11.

The complainants alleged that the respondents, the White Pass & Yukon Ry Co., were charging excessive tolls for transporting traffic by a land and water route (known as the White Pass & Yukon route) from Skaguay in Alaska through a portion of British Columbia to White Horse in the Yukon Territory and thence by water to Dawson.

The respondents were incorporated in England and holding all the stock of, owned, controlled and operated the Pacific & Arctic, the British Columbia, Yukon and the British Yukon Ry. Cos., the first incorporated in the State of West Virginia, the second in the Province of British Columbia, and the third in the Dominion of Canada, and also the British Yukon Navigation Company, authorized to operate steamers on the Yukon River leading from White Horse to Dawson.

Held, 1. That under section 336 of the Railway Act, the Board had power to order the various railway companies and the controlling railway to file a joint tariff for the land portion of the route from Skaguay to White Horse.

2. That the British Yukon Ry. Co. could be called upon to file a joint tariff for the continuous route from Skaguay to White Horse.
3. That the British Columbia Yukon, a provincial railway connecting with the British Yukon, a Dominion railway, is by section 8(b), as regards through traffic carried over it, subject to the Railway Act.
4. That the Board had jurisdiction under sec. 336 to call upon the White Pass and Yukon Ry. Co. to require the Pacific and Arctic Ry. Co., a foreign railway, to enter into the necessary agreements for filing a joint tariff for the said route.
5. That the Board itself under the recent amendment to the Railway Act (8 & 9 Edw. VII. ch. 32, sec. 11) might require the Pacific and Arctic to enter into such agreements.
6. That the respondents as controlling and operating the two Canadian Ry. Cos. (authority to construct or operate not being required) are by the said amendment made subject to the Railway Act.
7. That the Board had no jurisdiction over the tolls of traffic delivered to the respondents at Skaguay destined to Dawson, the water route between White Horse and Dawson not being part of a "continuous route in Canada" under section 333.
8. That under section 338, sub-section 2, the Board had power to disallow or otherwise deal with the tolls in such joint tariff.
9. That the question of reasonable rates should be dealt with after the joint tariff has been filed.

THIS case was argued on the question of jurisdiction at Ottawa on 10th and 11th June, 1909.

F. T. Congdon, for the applicants.

F. H. Chrysler, K.C., for the Railway Companies.

The facts are fully set out in judgment of the Chief Commissioner.

June 14, 1909. THE CHIEF COMMISSIONER:—This matter has its origin in a complaint filed by the Dawson Board of Trade against the *Upper Yukon Transportation Companies* known and operating under the name of the *White Pass and Yukon Route*. For various reasons great delay has occurred in dealing with

the case, the evidence having been given before the Board as constituted in 1906, and the respondents having denied jurisdiction, that question was only argued on June 10th and 11th inst., and although the argument covered the reasonableness of the tolls exacted as well as the matters of jurisdiction, it is thought better at this moment to deal only with the latter question. Hitherto the *route or system* complained of has not recognized the jurisdiction of the Railway Board, and has not filed tariffs, so the Board has acquired knowledge of the schedules of tolls only by their being given in evidence upon this enquiry. The first point for consideration is whether these tariffs should be filed pursuant to the provisions of the Railway Act, and whether the Board has authority to so direct. The land and water route in question between Skaguay and Dawson is operated under the following combination:

A railway company known as the Pacific and Arctic was incorporated under the laws of West Virginia with authority, it is said, to construct a railway from Skaguay through Alaska to a point in British Columbia. The British Columbia Yukon Railway was incorporated on May 8th, 1897, by an Act ch. 49 of the British Columbia Legislature with power to construct, equip, maintain and operate a railway from a point in British Columbia between the 134th and 136th degrees of longitude at or near the head of the Lynn Canal thence to the North Boundary line of British Columbia. The British Yukon Company was incorporated by 60 and 61 Vict. ch. 89 (Dom.) with authority to lay out, construct and operate a railway from a point in British Columbia or in the North-West Territories near the Northwestern or Western Boundary of British Columbia between the 134th and 136th degrees of west longitude, near the head of the Lynn Canal, or at some point in a north-easterly direction from the head of the canal, across the White Pass, northerly and westerly to Selkirk. It had authority also to carry on in British Columbia the business of carriers and forwarders. Section 17 provided that the Railway Act should be incorporated with the Special Act. In 1901 the British Yukon Navigation Company

was incorporated by letters patent under the British Columbia Act, and was given authority to operate steamers upon the Yukon River. The White Pass and Yukon Railway Company was incorporated in England by letters patent and holds all the stock and bonds of the four firstly mentioned companies, save, it is said, only sufficient qualifying stock for the directors of the four companies, although the annual reports of the company repeatedly state that it holds *all* the stock of the other companies, and the holding company through proxies given by it elects the directors of the four companies. Mr. S. H. Graves is president of these, but the personnel of the Boards is not the same in each case. A contract company built the land lines under contract with the three railway companies and the White Pass and Yukon Railway Company, but it is not necessary, in dealing with the question of jurisdiction to go elaborately into the history of the construction of the route. There is no separate working or operation of this route from Skaguay to Dawson. The same engines and cars operate under the same train crews, and under the same management, from Skaguay to White Horse, where traffic is transferred to steamers, the liabilities against which are in the same hands that hold the stock and bonds of the railway lines, as well as the stock of the Navigation Company; the management of the steamers being the same as that of the land lines; the receipts from the whole four alleged separate portions of the route go into a common purse, out of which the expense of the through transportation is paid, and the whole of the balance turned over to the White Pass and Yukon Railway Company, which, after making provision for its liabilities divides the surplus among its stockholders. The railway lines were constructed and *equipped* by the Contract Company in consideration of the latter receiving all the stock and bonds of the former companies, and this arrangement was carried out, the Contract Company transferring these holdings to the White Pass and Yukon Railway Company. This feature is mentioned here only for the purpose of dealing, so far as necessary, with the equipment of the railway com-

panies. It would seem that this equipment is owned either by the White Pass and Yukon Railway Company, or in common by the three local railway companies, some portion of the stock and bonds of each going to the White Pass and Yukon Railway Company, through the hands of the Contract Company, to pay for the equipment—at any rate the ownership of the equipment seems to be the same whether the engines and cars are running on the portion of the road or route in Alaska, in British Columbia or in the Yukon Territory. Upon reference to the return made by the British Yukon Railway Company, a railway admitted to be subject to the jurisdiction of the Board, to the Minister of Railways, for the year ending June 30th, 1905, it would seem that this railway reported that it was operating 32 miles of road in British Columbia and 58 in the Yukon Territory, and that it (the British Yukon Railway) had a junction with the Pacific and Arctic; then turning to the equipment that this company owned (see pp. 16 and 17 of the return) it seems to include all the equipment that appears upon p. 9 *list of rolling stock* in the directors' report of the White Pass and Yukon Railway Company to June 30th, 1905. Now, if the particulars set out in this Government return are accurate, the member of this combination that was brought into corporate existence by the Parliament of Canada was taking the position that it owned all the rolling stock upon the whole system and was operating all the portion of the rail route that lay in Canada—it will be observed also that its charter authorized it to construct and operate in British Columbia.

It is apparent from traffic agreements, mode of operation, arbitrary division of receipts for bookkeeping purposes, election of directors and appointment of officers, that in fact there has never from its inception been anything but a through route from Skaguay to Dawson. Take a resolution passed on June 15th, 1900, as an illustration:—

“WHEREAS *The P. & A. Railway Company, The British Yukon Railway Company and The British Columbia Yukon Railway Company* for the purpose of facilitating joint and through

traffic over their respective lines, have hitherto entered into certain joint traffic agreements and thereunder jointly compose what is known to the public as the *White Pass and Yukon Route*, and whereas for convenience of bookkeeping and accounting the book and bank accounts have heretofore been kept in the name of the White Pass and Yukon Route and such system has proved satisfactory and convenient, therefore be it resolved that such system of keeping book and bank accounts be and is hereby ratified, adopted and approved."

I am not overlooking the fact that at this time the river division had not been acquired, but similar resolutions appear subsequent to that formation. Take the minutes of the meeting of June 24th, 1902, when a resolution was passed authorizing the "making of a new agreement with reference to the traffic receipts of the railway of the three companies already mentioned and the British Yukon Navigation Company, by which the gross through traffic earnings were to be applied in the first place to the payment of the operation and other expenses of the four companies—in the second place to the interest upon the bonded debt of the four companies, in so far as the local earnings of the companies should be insufficient to meet the operating expenses and bonded interest and the remainder of the through traffic earnings are divided between the companies in the following proportions:—

"30% to the P. & A. Ry. Co.,

"10% to the B.C. Ry. Co.,

"25% to the B. Y. Ry. Co.,

"35% to the B. Y. Nav. Co.,

"and that the operating expenses of the through line of railway from Skagway to White Horse be divided as follows:—

"54% by the P. & A. Ry. Co.,

"14% by the B.C. Ry. Co.,

"32% by the B. Y. Ry. Co.,

"and that each company would in respect of traffic originating on its own line and billed or ticketed through to a point on the line of the other be the sole party to arrange on its own behalf

the terms, rates and all other conditions incident to the contract of carriage and that the other companies over whose line such traffic might pass should be, as between themselves and the originating company, bound to recognize such terms, rates and conditions."

The route has been and is still being operated as a through route, under one management, and Mr. Graves arbitrarily apports between each of the combined corporations a percentage of earnings. It may be that as to creditors these various entities should be continued, but for the purposes of this enquiry, it is plain that in effect the English company owns and operates this line of transportation from Skaguay to Dawson—it was said that company was a holding corporation only, that it had no power either to construct or operate; but it does operate—what is the difference between the English company electing all the directors of the other four companies who in turn appoint a common management, and the English company itself appointing the common management? The English company is the only creditor of the other four, and each of the four is liable to the English company for the debts of the other, or at least the same result could be worked out by reason of the clause in the resolution of June 24th, 1902, relating to the bonded interest where the individual company was not earning enough to pay its own, but whatever the proper view of all this may be, the question is as to the Board's jurisdiction upon the foregoing facts.

It was said almost the entire traffic going to White Horse and to river points below, had its origin in Puget Sound ports, and agreements are on foot and in force between the steamship companies carrying traffic into Skaguay and the respondents, for joint through rates from Puget Sound points to White Horse and below; these agreements apportion the tolls between the steamship that delivers at Skaguay and the respondents, and the tariffs issued by respondents produced before the Board are from Puget Sound points, and so include the steamship proportion to Skaguay. It is not suggested that the respondents

are financially connected with or interested in any of the steamship companies delivering traffic at Skaguay—these are independent carriers and are not before the Board, even if they were in any way subject to its jurisdiction—nor is the matter to be considered as an application to require through rates from Canadian points, via Skaguay and back to a Canadian destination. Traffic is delivered at Skaguay to respondents destined to White Horse—what jurisdiction has the Board, if any? Traffic is delivered at Skaguay to respondents destined to Dawson—what jurisdiction has the Board, if any?

Section 336 provides that as respects all traffic which shall be carried from any point in a foreign country into Canada by any continuous route owned or operated by any two or more companies, whether Canadian or foreign, a joint tariff for such continuous route shall be duly filed with the Board. Skaguay is a point in a foreign country, White Horse a point in Canada, a continuous route has long been established between those points, and whether this route is owned or operated by two or more companies the section provides that a joint tariff for the through route *shall* be filed. None has been filed, and it is said the Board is powerless to so require. The British Yukon Railway Company is subject to the jurisdiction of the Parliament of Canada, and section 8, sub-section (b) declares that any railway the construction or operation of which is authorized by the Legislature of any province shall, as to through traffic, when such road connects with a road within the legislative authority of Parliament, be subject to the Railway Act. The through traffic passing over the portion of this continuous route in British Columbia is then subject to the Railway Act. Again, if the returns of the British Yukon Railway Company are to be accepted it is and has all along been operating the British Columbia section and sub-section 21 of section 2 defines "railway" as any railway which the company has authority to construct or *operate*. The British Yukon Railway Company has authority to *operate* the section of the road in British

Columbia, so in no aspect of the matter can it be said that this railway company cannot be required to file a joint tariff for the continuous route from Skaguay to White Horse. Such a tariff does not require any additional agreements than those now on foot, but if it did I think the White Pass and Yukon Railway Company could be called upon to require the Pacific and Arctic Railway Company to enter into the necessary agreements; or indeed the Pacific and Arctic Railway Company may be required by the Board to so agree. The amendment to the Railway Act passed at the last session extends its provisions to any railway company incorporated elsewhere than in Canada owning, controlling, operating, or running trains or rolling stock upon or over any line or lines of railway in Canada, either owned, controlled, leased or operated by such railway company or companies, whether in either case such ownership, control or operation is acquired by purchase, lease, agreement, control of stock or by any other means whatsoever; and to any and all railway companies operating or running trains from any point in the United States to any point in Canada.

It was said that the White Pass and Yukon Railway Company did not fall within this section because it had no authority to construct or operate a railway in Canada; but as the holders of all the stock in the two railways incorporated in Canada it must of necessity *control* the lines of these two Canadian companies, and it makes no difference whether it *operates* them directly or through the agency of the local Boards that it elects and dominates. It makes no difference whether it had authority to *construct*, and the Statute of 1909 does not require the company to have *authority* to operate, it extends the provisions of the Act to all railway companies incorporated in Canada or elsewhere that are operating, either through control of stock or by other means whatsoever.

Then as to the Pacific and Arctic Railway Company. Suppose the proper view to be that the section of the road in Alaska is operated by that company, section 336 provides that traffic from Skaguay carried by it into Canada shall be covered

by a joint tariff, which shall be duly filed with the Board—it is the duty of that company to file such a tariff, at least to join in the establishment of such a tariff, and if Parliament has imposed this duty upon the foreign carrier engaged in carrying international traffic why should not this Board by order require the fulfilment of this obligation? The Board has no alternative but to require carriers to observe the provisions of the Act. It was said there was no means of enforcing such an order but it is not to be taken for granted that the directions of the Board will not be complied with, and the mode of enforcement may be left for consideration when the necessity therefor arises.

Then as to traffic delivered at Skaguay and destined to Dawson. Sub-section 3 of section 333 provides that “if the company owns or uses vessels for carrying traffic by sea or inland water between ports in Canada, and if such vessel carries traffic between a port in Canada reached by such company and a port in Canada reached by the railway of another company, the vessel and the railway of either company shall be deemed to constitute a continuous route in Canada within the meaning of this section,” but as the section itself is dealing only with traffic passing over *any continuous route in Canada* it is apparent it can have no application to traffic delivered to respondents at Skaguay, and so it would seem that as to such traffic destined to Dawson or other river points reached by the respondents’ steamers the Board has no jurisdiction.

Section 335 provides that when traffic is to pass over any continuous route from a point in Canada to a foreign country and such route is operated by two or more companies whether Canadian or foreign, the several companies shall file with the Board a joint tariff for such continuous route, and sub-section 2 of section 338 provides that the Board may require to be informed by the company of the proportion of the toll or tolls, in any joint tariff filed, which it or any other company, whether Canadian or foreign, is to receive or has received.

The conclusion therefore is that the Board has jurisdiction over the tolls which the company or companies may be entitled

to charge upon through traffic received at Skaguay destined to White Horse or to any intermediate point between the international boundary between Alaska and British Columbia and White Horse, upon the railway line; and upon through traffic received at any point upon the railway line between White Horse and the said international boundary destined to Skaguay.

Much evidence was given and vast quantities of statistics compiled with the view of shewing that the tolls hitherto charged were excessive, but the Board does not deal with this branch of the case at this stage. The tolls we have authority to deal with are those above indicated only, the tariffs before us are almost entirely directed to through rates from Puget Sound ports to Dawson, including the earnings of the steamship to Skaguay, and that of the river line from White Horse to Dawson, the respondents should have an opportunity of preparing tariffs covering the above traffic upon what they regard as a proper basis before the same are reviewed by the Board; these tariffs must be prepared without delay and duly filed when they will be considered by the Board in the light of the evidence already given and each side may supplement as may be reasonable, the Board in the meantime expressing no opinion as to the fairness of existing tolls. The companies should also inform the Board of the proportion of the through toll or tolls that is allotted to any company or companies, if any such division is continued or made.

In holding that the Board has jurisdiction over the tolls of this rail route the view is taken that where the company or companies are required by the Act to file tariffs the result follows that the Board has the power to disallow or otherwise deal with them.

Mr. Commissioner McLean concurred.

NOTE.—Since the delivery of the above judgment the parties have been called upon to submit argument as to the effect (if any) of sec. 7 of the Railway Act to the facts in this case.

JURISDICTION.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

MCDougALL AND SECORD V. CANADIAN PACIFIC RY. CO.

(File No. 1418.)

Jurisdiction—Order—Review, rescind, change, alter or vary—Approval—Location—Registration—Plan, profile and book of reference—Compensation—Present value—Charter of railway company—Railway Act. secs. 26, 30 and 158—Railway Act, amendment, 7 & 8 Edw. VII. ch. 62, sec. 29.

Application to the Board for an order under sections 26, 30 and 158 of the Railway Act, declaring the plan, profile and book of reference affecting certain lots deposited in the Registry Office by the railway company, not to be in accordance with the provisions of the Railway Act.

The plan had been registered with respect to a portion of the property in question, but no steps had been taken for several years to negotiate with the owners and fix the price to be paid by the railway company.

Held, 1. That an order should be made cancelling the location shewn by such plan, etc., through the lots in question.

2. That the Board has jurisdiction under section 29 of the amendment to the Railway Act, 7 & 8 Edw. VII. ch. 62, to review, rescind, change, alter or vary any order made by it.

3. That the charter of the company does not authorize it to register plans upon the lands of private persons and then take no steps to acquire title to such lands during the life of the charter.

4. If the company is willing to expropriate the lands in question upon the basis of the present value of such lands, no order need issue.

5. Leave to appeal should be obtained from a Judge of the Supreme Court as the question is one of jurisdiction.

THE application was heard at Edmonton, Alberta, February 19th, 1909.

C. F. Newell, for the applicants.

R. B. Bennett, K.C., for the railway company.

The facts are fully set out in the judgment of the Chief Commissioner.

February 19, 1909. THE CHIEF COMMISSIONER:—This application brings up an important question, and if counsel for

the railway company is right about it, it may as well be disposed of at once, so that if the view we take is erroneous we can be put right without delay.

This application affects lots 125 to 144 in block 10, and lots 41, 91 and 92 in block 9 of the Hudson Bay Reserve. Now, in reference to the first series of lots, in block 10, it seems before this application was launched *bonâ fide* steps were taken to ascertain the value of the property, so that the railway company might obtain title from the owners. These proceedings were on foot, and it does not appear to us to be a wise thing to interfere with those proceedings, and with respect to the lots in block 10, the application must be refused.

The situation is quite different with respect to the three lots in block 9. This plan has been registered upon these lots now since, I think it was said, 1906.

Mr. Newell:—The 26th May, 1905.

THE CHIEF COMMISSIONER:—1905 it is said; apparently no steps have been taken to negotiate with the owners of these three lots and fix the price that should be paid by the railway company upon taking title from the owners.

I do not know why steps were not taken to arbitrate with respect to the land in block 9 at the same time that proceedings were taken with respect to the lots in block 10. However, the fact is that no steps have been taken, and that during the past four years a cloud has rested upon these lands by the registration of this plan.

Now, the statute limits the compensation to be fixed, in the event of the parties being unable to agree, and confines the arbitrators upon arbitration to the value of the land at the date of the registration of the plan.

It is contended by counsel for the railway company that under the statute authorizing the construction of the railway, the railway company has a right to register plans upon the lands

of private individuals, tie them up during the whole life of the charter without taking any steps to acquire title, and when steps are taken, then the landowner is limited in compensation to the value of the lands at the date of the filing of the plans.

I do not understand that to be the law. If it is, the sooner it is found out to be the law the better for all concerned.

I think that under the Railway Act, where the Board has granted an order approving of the plan, thereby permitting it to be registered, there is clear authority to rescind such order under the amended section 29 of the Act of last year, which gives the Board power to review, rescind, change, alter or vary any order made by it.

Now, there was an order made by this Board approving of the location of this line through these three lots. It seems to me, if the language of the section means anything, it means that this Board may review that order, may rescind it, may change it, or may alter and vary it, and the conclusion we come to is that it will do equity between these parties to vary that order by rescinding the portion of it which located or approved of the line of location through these lots 41, 91 and 92; and that will be the order of the Board.

If, on the other hand, the railway company is willing to let compensation be based upon the present value, no order need issue. If, however, that course is not agreed to, an order will go varying the former order by cancelling the location through these lots I have indicated.

Mr. Bennett:—And not substitute any location, which tends to destroy the original line of railway?

THE CHIEF COMMISSIONER:—It does not have that effect at all.

Mr. Bennett:—Then we have no approved location through these lots.

THE CHIEF COMMISSIONER:—All you have to do is to file a new plan and book of reference, and we may approve of them.

Mr. Bennett:—It must be the same thing over again.

THE CHIEF COMMISSIONER:—No, it is not the same thing over again, because it allows the landowners to get compensation on the present value.

Mr. Bennett:—So far as location.

THE CHIEF COMMISSIONER:—I am not concerned with that. That is the order.

NOTE.—An application for leave to appeal from the order was referred to a Judge of the Supreme Court, the Chief Commissioner being of opinion that the question involved was one of jurisdiction.

NOTE.—See 8-9 Edw. VII. ch. 32, sec. 3.

“Sub-section 2 of section 192 of the said Act is amended by adding thereto the following: ‘Provided, however, that if the company does not actually acquire title to the lands within one year from the date of such deposit, then the date of such acquisition shall be the date with reference to which such compensation or damages shall be ascertained; and provided further, that the foregoing proviso shall not prejudice the operation of any award, or of any order or judgment of any Court of competent jurisdiction, heretofore made, or any arbitration now pending and any appeal from any such award, order or judgment shall be decided as if the foregoing proviso had not been enacted.’ ”

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

THRIFT V. NEW WESTMINSTER SOUTHERN & GREAT NORTHERN
RY. COS.

(File No. 9841.)

Jurisdiction of the Board—Provincial railway—Work “for the general advantage of Canada”—Foreign railway—Operation in Canada—Through traffic—Station facilities—Railway Act, secs. 2 (21), 8 (b).

An application was made to the Board for an order directing the Great Northern Ry. Co. to construct a platform and station building.

The New Westminster Southern, a provincial railway, incorporated by an Act of the Legislature of British Columbia, had not been declared a work “for the general advantage of Canada.”

The trains of the Great Northern, a foreign railway, used the line of the New Westminster Southern as a connecting line between its line in the State of Washington and Vancouver in British Columbia. The latter company was not shewn to have any rolling stock or equipment, or so far as operation was concerned to be in any way a separate organization from the former.

Held, 1. That the Great Northern, a foreign railway, is subject to the jurisdiction of the Board in so far as it operates in Canada.

2. That the New Westminster Southern, a provincial railway, although not declared to be a work “for the general advantage of Canada,” but connecting with a railway subject to the jurisdiction of the Board, is, by section 8 (b) as regards through traffic upon it, and all matters appertaining thereto, subject to the Railway Act.

3. That station facilities are matters appertaining to through traffic.

4. That proper facilities should be provided for the safety and convenience of the public using the trains of the Great Northern Railway.

5. If the Great Northern desires to apply for leave to appeal upon the question of jurisdiction, the issue of the order may be delayed for 30 days but, if not, the size and location of the station and platform may be defined by an engineer of the Board.

THE application was heard at Vancouver, February 25th, 1909.

The applicant in person.

A. H. McNeill, K.C., for the Great Northern Railway Company.

The facts are fully set out in the judgment of the Chief Commissioner.

March 15, 1909. **THE CHIEF COMMISSIONER:**—The New Westminster Southern was incorporated by an Act of the British Columbia Legislature, and has never been declared to be a work “for the general advantage of Canada,” and objection was therefore taken that this railway is not under the control of, or within the jurisdiction of the Board of Railway Commissioners.

The road is operated by the Great Northern Railway. It was not shewn that the New Westminster Southern had any rolling stock or equipment, or, so far as its operation was concerned, that it was in any way a separate concern from the Great Northern. The trains of the latter road between Seattle and Vancouver pass over the line of the New Westminster Southern, and it is the connecting link between the line of the Great Northern, in the State of Washington, and Vancouver.

The Great Northern Railway, in so far as it operates in Canada, is subject to the jurisdiction of the Board. The New Westminster Southern connects with the former railway, and so falls within section 8 with respect to through traffic and all matters appertaining thereto. Sub-section 21 of section 2 defines “railway” as meaning any railway which the company has authority to construct or operate.

The situation then is that a railway company subject to the jurisdiction of the Board is operating this provincial road, and the applicant asks that certain facilities shall be provided by the railway company at Hazelmere, in the Province of British Columbia. The request is that a platform be established so that passengers may disembark with safety from the Great Northern trains and some small station building be provided as a means of shelter for travellers.

These are matters appertaining to through traffic upon this railway, and I am of opinion that to that extent the railway is under the jurisdiction of the Board. I think it also only reasonable that proper facilities should be provided at Hazelmere for the safety and convenience of the public using the trains of the Great Northern Railway. The station need not be an expen-

sive affair, but the Great Northern Railway Company, I think, should provide a suitable platform and a building of moderate expense that may be used by travellers as a shelter, and also for the temporary storage of freight. The Great Northern Railway Company, whose counsel opposed the application, will be added parties.

The formal issue of the order may be delayed for 30 days if the Great Northern Railway Company desires to apply for leave to appeal upon the question of jurisdiction. If no appeal is taken one of the Board's engineers may define the size of the platform and location, and size of the shelter as well as the location.

NOTE.—See the Flag Station Case, 8 Can. Ry. Cas. 151.

UNJUST DISCRIMINATION.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

KERR V. CANADIAN PACIFIC RY. CO.

(File No. 9796.)

Unjust discrimination—Special mileage tariff—Division of through rate—Local consumption—Eastern markets—Competition—Grain growing territories—Through shipments—Local rate—Reasonableness—Crow's Nest Pass Agreement.

On a complaint to the Board that the rate on grain, grain products and vegetables for local consumption from Franklin to Winnipeg was unjustly discriminatory as compared with the rate from the same point to Fort William a much farther distance on the same goods for eastern markets.

- Held*, 1. That the complaint should be dismissed. The conditions affecting through shipments at through rates are such that a division of through rates cannot be taken as a measure of the reasonableness of a local rate.
2. The competition of other grain growing territories fixes the rate on through shipments to eastern markets.
3. The rates are also affected by the Crow's Nest Pass Agreement: See *British Columbia Pacific Coast Cities v. Canadian Pacific R.W. Co.* (*Vancouver Interior Rates Case*), 7 Can. Ry. Cas. 125.

THE application was heard at Winnipeg on the 10th March, 1909.

O. H. Clarke, K.C., for the Canadian Northern Ry. Co.

W. H. Curle, for the Canadian Pacific Ry. Co.

The complainant did not appear but sent his complaint by letter to the Board.

The facts are fully set out in the judgment of Mr. Commissioner McLean.

May 10, 1909. MR. COMMISSIONER McLEAN:—Franklin is a station on the Canadian Pacific Railway, 126 miles from Winnipeg. The rate from Franklin to Winnipeg, under the company's special mileage tariff on grain, grain products and vegetables, is thirteen cents per hundred pounds; this is also the eighth class rate in the Canadian classification. It is contended that this rate is discriminatory since the rate on grain and grain products from Franklin to Fort William, a distance of 550 miles, for furtherance east is likewise thirteen cents. It cannot be urged that this constitutes a discrimination against the applicant. The rate to Fort William is a division of a through rate concerned with a through shipment to an eastern market. Where grain and grain products move to Fort William for local consumption they move on the company's special mileage tariff and take a rate of 29 cents. The through rate of which the 13 cents form a part is affected not only by the competition of other grain-growing territories; it was also reduced by the provisions of the Crow's Nest agreement. The conditions affecting the through shipments handled on this through rate are such that a division of such a through rate cannot be taken as the measure of the reasonableness of a local rate from Franklin to Winnipeg. The complaint should therefore be dismissed.

The Chief Commissioner concurred.

UNJUST DISCRIMINATION—UNREASONABLE TOLLS.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.]

CANADIAN PORTLAND CEMENT CO. v. GRAND TRUNK AND BAY
OF QUINTE RY. COS.

(File No. 10114.)

Unjust discrimination—Unreasonable tolls—Competition—Similar factories—Costs of production—"Equality" clause—Similar circumstances and traffic conditions—Mileage distance—Water competition—Differences in traffic conditions—Main and branch line mileage—Heavy and light traffic—Low-grade tonnage—Compelled rate—Traffic—Important in amount—Railway Act, secs. 315, 334.

Upon a complaint under secs. 315 and 334 of the Railway Act by the Cement Company that the through toll of \$1.50 per ton on bituminous coal from Black Rock, N.Y., to Marlbank, Ont., was unjustly discriminatory and unreasonable, because (1) there should be no difference in the tolls on coal to the applicants competing with similar factories receiving more favourable treatment, (2) on the basis of mileage, (3) as compared with tolls to other points such as Belleville and Kingston. From Black Rock to Napanee, a distance of 237 miles, the coal moved over the Grand Trunk Railway, and thence to Marlbank, a distance of 36 miles, over the Bay of Quinte Railway. Out of the through toll the Grand Trunk received \$1.05, or 70 per cent., and the Bay of Quinte the balance.

Held, 1. That the "equality" clause of section 315 was not intended to equalize the cost of production between similar competing factories, but applies only when such factories were given more favourable treatment under similar circumstances and conditions of traffic.

2. That a comparison of mileages as if both hauls were on the same railway line was not a proper method of comparison, difference in traffic conditions being in general more important.

3. That the principle recognized in the *Almonte Knitting Company* case that a higher toll may be charged to points on a branch line than to points on a main line, though at a less distance from the junction point, applies with greater force in favour of a light traffic and low-grade tonnage railway as compared with a heavy traffic and high-grade tonnage railway.

4. That the toll to Marlbank cannot be compared with compelled tolls to other points such as Belleville and Kingston, where there is not effective water competition to Marlbank on traffic important in amount.

5. That, upon the evidence, the toll charged is not unreasonable.

6. The Grand Trunk having stated its willingness to reduce its division of the through rate to \$1.00 per ton, the Bay of Quinte to participate in such through rate, receiving thirty per cent., the Board approved a rate of \$1.43 per ton.

Almonte Knitting Company v. Canadian Pacific and Michigan Central Ry. Cos., 38 Can. Ry. Cas. 441, followed.

THE application was heard at Ottawa, May 19th, 1909.

The facts are fully set out in the judgment of Mr. Commissioner McLean.

W. N. Tilley, for the applicant.

W. H. Biggar, K.C., for the Grand Trunk Ry. Co.

June 25, 1909. MR. COMMISSIONER McLEAN:—This is an application by the Canadian Portland Cement Company for a reduced through rate on bituminous coal from Black Rock, New York, to Marlbank, Ontario, where a cement plant of the applicant company is located. From Black Rock to Napanee this coal moves over the Grand Trunk Railway, a distance of 237 miles; thence to destination, a distance of 36 miles, it moves over the Bay of Quinte Railway. The rate at present in force is \$1.50 per ton; of this the Grand Trunk Railway receives \$1.05. It is alleged that the existing through rate is discriminatory and unreasonable.

The application is launched under secs. 315 and 334 of the Railway Act. The central point in the complaint is based on the competition of other cement producers. To quote the words of the complaint:

“We submit that the present rate to Marlbank is excessive and unjustly discriminatory, and that there should be no difference in rates on the commodity, particularly as it enters largely into the cost of production of the output of the applicants, who have to compete in open markets with similar factories accorded more favourable treatment.”

No doubt the coal, of which from 40,000 to 45,000 tons per annum are consumed, does constitute an important factor in the cost. This phase of the application is in reality a plea that sec. 315, the “equality” clause, should be used to bring about an equalization of costs of production. This clause is, however, concerned with traffic conditions. The allegations regarding “similar factories” are of no value unless the “similar factories” are under similar circumstances and conditions of traffic, accorded

more favourable treatment. This has not been established. It is no part of the obligations of the railways, under the Railway Act, to equalize costs of production through lowered rates so that all may compete on an even keel in the same market. This phase of the complaint fails.

In the hearing the ground shifted somewhat. Comparisons were made by counsel of the rates to Marlbank, with those to such points as Belleville and Kingston. This also has been referred to in the complaint. While Mr. Pullen stated in evidence that there was a competing cement plant at Belleville, counsel for the applicant laid no stress on the point. Counsel for the applicant alleged that these comparisons afforded evidence of discrimination as well as a measure of what should constitute a reasonable through rate to Marlbank.

The following tables shew distances, rates and earnings per ton per mile:

COAL IN CARLOADS.

	Miles.	Rate Per ton.	Ton mile earnings.
Black Rock to Belleville.....	215.....	.90.....	.418c.
Kingston.....	263.....	\$1.25.....	.475c.
Napanee (local).....	237.....	\$1.10.....	.464c.
Marlbank.....	273.....	\$1.50.....	.549c.

The rate to Marlbank is made up in the following way:

	Miles.	Division.	Ton mile earnings.
Black Rock to Napanee.....	237.....	\$1.05.....	.443c.
Napanee to Marlbank.....	36.....	.45.....	1.25c.

The argument as to discrimination based on the above comparisons is concerned (a) with mileage, (b) with water competition.

Mileage.—It is contended that it is unjustifiable to have the rate to Marlbank, ten miles further than to Kingston, 25 cents higher. To compare these mileages as if both were Grand Trunk hauls throughout, is not a proper method of comparison. It is

recognized that differences in traffic conditions are in general more important than mere mileage comparisons. In the *Almonte Knitting Company* case the Board recognized that the Canadian Pacific rate on coal to Almonte, seven miles from Carleton Junction, might justifiably be built up by adding an arbitrary of 20c. per ton to the rate to Carleton Junction. *Almonte Knitting Company v. Canadian Pacific and Michigan Central Ry. Cos.*, 3 Can. Ry. Cas. 441.

When this principle is recognized as between main line and branch line mileage of the same system it is applicable in greater degree when the rate is made up of a long haul over a heavier traffic road and a short haul over a light traffic road. The Bay of Quinte is a low-grade tonnage road, and any comparison on the basis of Grand Trunk main line mileage alone is therefore inconclusive as proving discrimination.

Water competition.—The rates to Belleville and Kingston are compelled rates based on water competition. At Belleville the competition of the water-borne coal from across the lake is especially effective. So far as the Grand Trunk haul to Napanee is concerned, water competition is not directly effective. Counsel for the applicant states that coal may be moved by water to Marlbank, but not in sufficient quantity to meet the needs of the business. That is to say, there is not effective water competition in regard to traffic important in amount. The argument, then, from the comparison of the Marlbank rate with rates subjected to effective water competition, also fails. The Marlbank rate must, then, be looked at from the standpoint of its general reasonableness. The rate as between the Bay of Quinte and the Grand Trunk is divided in the proportions of 30 and 70 per cent. This is equivalent to rating the 36 miles of the haul over the Bay of Quinte as having a constructive mileage of approximately 103 miles. As has been stated, this road is a low-grade tonnage one. For the year ending June, 1908, it carried 268,549 tons of freight—62 per cent. of this is represented by the items of bituminous coal, coke, stone and sand, lumber and cement, brick and lime.

The average ton-mile earnings of the road are very low—.1570 of 1c. The two important revenue producers of the road are bituminous coal and cement. The net earnings of the road are low—some \$800.00 per mile. It does not appear, from the record or from the Government statistics bearing on the matter, that the 30 per cent. division is an unfair one.

So far as the Grand Trunk division is concerned, it is to be noted that its division of the through rate is lower than its local rate to Napanee. It is contended by the applicants that the absence of a terminal service at Napanee in respect of the through traffic should give a still lower division. The evidence, however, shews that there is a division of terminal service at Napanee between the Grand Trunk and the Bay of Quinte.

The Grand Trunk has stated its willingness to reduce its division of the through rate to \$1.00 per ton. The Bay of Quinte states it is willing to participate in whatever through rate is quoted subject to receiving 30 per cent. The division of \$1.00 to Napanee will give a ton mile rate of .422 of 1c. as compared with the rate of .418 of 1c. to Belleville, where there is effective water competition.

I am of opinion that an arrangement on the basis outlined above is fair and reasonable, and that an order should go for a rate of \$1.43 per ton to Marlbank.

The Chief Commissioner and the Assistant Chief Commissioner concurred.

EXCESSIVE TOLLS.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

CARDSTON BOARD OF TRADE V. ALBERTA RAILWAY AND
IRRIGATION CO.

(File No. 8939.)

Excessive tolls—Passenger fares—Standard passenger and special freight tariffs—Filed—Similar distances—Same commodities—Special class rate tariff—Parity in rates—Another railway company—Similar business—Express tariff to be filed—Deficient car service—Passenger facilities—May renew complaints—Insufficient information for the Board—Railway Act, secs. 2 (9), 350.

Complaint that the respondent corporation charged excessive passenger. freight and express tolls, and did not furnish sufficient car service and passenger facilities.

The respondent corporation operate a railway and collieries; own large areas of irrigated lands and town lots, and is the result of amalgamation of the Alberta Railway and Coal, Canadian North West Irrigation, St. Mary's River Railway, Alberta Railway and Irrigation Companies.

Counsel for the respondent contended that the tolls should not be reduced and greater facilities furnished, because the railway and irrigation works did not pay, and the land and coal areas covered the deficits.

The Canadian Pacific Railway Company recently acquired a controlling interest in the respondent corporation, and will probably operate its railway.

Held 1. That there was no evidence that the railway did not pay.

2. That the respondent corporation be required to file within a specified time, (a) standard passenger tariffs charging three cents per mile and one-sixth less for round trip tickets, (b) special tariffs of freight rates between all the stations on a basis that shall not exceed those of the Canadian Pacific for the same or similar distances and on the same commodities, (c) a special tariff of class rates not higher than the same tariff of the Canadian Pacific Railway for the same or the nearest equivalent distances, and (d) express tariff of tolls as required by sec. 350 of the Railway Act.

3. That the complaints relating to the respondent's express service and charge should stand for disposition until the general express enquiry is dealt with.

4. That the complaint as to deficient car service and passenger facilities may be renewed if necessary at the expiration of six months.

THE application was heard at Lethbridge on the 8th of March, 1909.

L. H. Jelliff, for complainants.

C. F. P. Conybeare, K.C., for the company.

The facts are fully set out in the judgment of the Chief Commissioner.

July 22, 1909. THE CHIEF COMMISSIONER:—The respondents operate a line of railway in Southern Alberta running southerly from Lethbridge; they own large areas of land that are being irrigated under an extensive system in course of construction by the company; they own and operate coal mines and have large numbers of town lots in Lethbridge and Raymond.

The present corporation is the result of an amalgamation in July, 1904, of four corporations, viz., The Alberta Railway and Coal Company, The Canadian Northwest Irrigation Company, The St. Mary's River Railway Company, and The Alberta Railway and Irrigation Company.

At the hearing, the Board was furnished with but little information as to the financial position of the company, or of the organization, financial history, capitalization of the four companies prior to the amalgamation. Since the hearing, the amalgamation agreement of July, 1904, and the directors' report for the year ending June 30th, 1908, have been filed, and we have been left to spell out the position as best we may.

It may as well be said at once that the documents that have been given us, and such information as we were furnished with at the hearing, in no way present, with any minute detail, the financial history of this organization. Counsel told us at the hearing that all the outstanding stock, both common and debenture, represented actual cash invested. This may be quite true, and we have no doubt counsel was so instructed and fully believed to be the fact, but it is something that could be so easily proved and is of so much importance that we take the liberty of thinking should not have been left open to question. There are many complicated matters in the amalgamation agreement that do not explain themselves, and while desiring to studiously avoid

in any way injuring the amalgamated corporation, it is difficult to approach a consideration of this matter without feeling that it is strange that there are so many points that have been left open and unexplained to the Board.

Owing to the variety of interests of the corporation, and its various sources of revenue, each having its own incidental expense of production, it was more than ordinarily necessary that the Board should be furnished with the fullest details.

The attack is made here upon the railway portion of the respondents' business; the report of June 30th, 1908, has this item, "net revenue from Colliery, Railways, Canals, Land Sales, etc., \$322,493.23." Earlier in the report it is stated that coal sales of the year amounted to 208,016 tons as compared with 122,947 for the previous year; the gross earnings of the railway were \$228,775.07 as compared with \$197,608.09 for the previous year; the land sales aggregated 125,202 acres and realized \$712,644.00; there were also sold during the year 3,206 acres in which the company had an interest with the Canadian Pacific Railway Company; the profit from the sale of town lots was \$9,594.00; also that in connection with land sales there was in reserve \$941,574.31; the receipts for the year from water rentals were \$24,635.41 as compared with \$18,969.78 for the previous year. It is stated that on June 30th, 1908, the company had on hand 427,981 acres remaining unsold, in addition to many lots in Lethbridge and Raymond. The following extracts are taken from this same report:—

"Generally the prospects of the company are very encouraging. The crops of the district have proved most satisfactory; the lands sold by the company are being occupied and cultivated by well-to-do settlers, tending to increased railway earnings, to coal sales, and to the enhancement of the value of the company's lands and town lots. The Canadian Pacific Railway in its annual report this year, mentions that it has managed to secure such an interest in the company as will constitute a substantial control; and the report adds that their investment will prove a profitable one. Your directors congratulate the shareholders on the Cana-

dian Pacific Railway having become largely interested in the company, thus securing the active co-operation of that powerful and successful corporation."

A statement sent to the Board subsequent to the hearing shews the earnings from the operation of the railway for the year ending June 30th, 1908, to have been, including the sum of \$10,046.69, being earnings from "telegraph, telephone, and other sources," \$204,094.07 and not \$228,775.07, as shewn in the report of the directors, and this difference of \$24,681 is to the extent of \$23,914.41 explained in this way: "The company, for the purpose of shewing the railway earnings to better advantage, made a bookkeeping entry debiting the colliery with the switching charge of 12½ cents per ton on the total output for the year, and crediting the railway with the same."

Now in one aspect of the situation this is an entirely domestic matter and something that the public have no business to inquire about, but as it arises here, it ceases to be a private booking matter of the company and becomes one that the public is largely concerned in. The attack is that the freight and passenger tolls charged the public are too high; the answer is that the railway does not pay. It then appears that the railway hauls large quantities of coal, the property of the company, and that someone thought it was only fair to the railway company to credit it with \$23,914.41, being 12½ cents per ton, as a "switching charge" for the coal output. We are not informed what this switching movement consisted of and have no means of knowing whether 12½ cents per ton is too much or too little, or whether there are other services that might properly be credited to the railway company or not. This is given as an illustration why, in a case like the present, it is so necessary to be informed of all details of the company's business, and we think the company should have furnished such information.

Again, we were not informed of the total capital that was invested in the railways and terminals, as a separate undertaking from the other branches of the company's activities. The absence

of this and other information which will readily suggest itself as being useful, hampers the Board in disposing of this case.

The report shews the company to be prosperous. A newspaper clipping was put in at the trial containing the following statement, to which no objection has since been taken: "The following clipping is taken from the annual report of the Canadian Pacific Railway Company for the year ending June 30th, 1908: 'The Alberta Railway and Irrigation Company owning 113 miles of railway in Southern Alberta, as well as an important colliery and about 425,000 acres of land, part of which is served by irrigation ditches, was operated by its owners as a close friendly connection of your company, yielding to our lines a large revenue from traffic interchanged, and furnishing the company and settlers along the railway a supply of coal. To insure a continuance of this desirable connection, your directors deem it prudent for the company to secure such an interest in the property as will constitute a substantial control, and they have arranged to do this at an approximate cost of \$2,000,000. Apart from the traffic advantages thereby safeguarded, the investment itself will prove a profitable one.' " This also indicates prosperity. Counsel told us at the hearing that "the things paying are being used for the support of the railway and irrigation ends that are not paying. That is the size of it. Land and coal cover the deficits." I endeavoured as far as possible at the hearing to get at the bottom of the matter, and although I have again gone over the notes of argument and the documents subsequently filed, I am unable to find evidence that there are deficits in the operations of the "railway and irrigation ends." In the first place, we are not furnished with the figures shewing receipts and expenditures of each of these enterprises separately, and until that is done, as well as an intimate knowledge of capitalization acquired, we can make no finding of fact as to which, if any, are the weak sisters in this family, and treated as a whole, both the directors of the respondent corporation, and the Canadian Pacific, the recent purchasers of a controlling interest, regard the holdings as

desirable; and treating the corporation as a whole, which is the way the matter is left upon our hands, we have no doubt that the views of the directors, and the purchasers of the stock, were well founded.

At the hearing, I endeavoured to get some idea of the amount of capital that was employed in this railway and its equipment, but was told no apportionment had ever been made, although the Department of Railways and Canals had repeatedly called for it, and the respondents have had much trouble from time to time over that matter.

We regard the control acquired over this road by the Canadian Pacific Railway Company a very material factor in this case. It was stated at the hearing, not by counsel for the respondent but by a gentleman who should know, that the Canadian Pacific Railway Company had acquired from 66% to 70% of the stock. This, of course, would place it in "substantial control." Now the only connection the respondent has in Canada is with the Canadian Pacific, and it has always been much dependent upon that railway company for its existence.

In addressing the last annual meeting of the shareholders, the president of the respondent company said that the demand for coal throughout the country exceeded the company's productive capacity, and that the tonnage sold depends wholly upon the Canadian Pacific Railway Company's car supply; and at the hearing the General Manager said the company had "seven locomotives, six passenger coaches, several cabooses and box cars and coal cars. As far as the equipment is concerned, through freight business is usually carried in through cars, cars of foreign roads; we allow none of our equipment off our own road;" and again, when asked how many box cars the company had he said "we have probably ten of our own; they are in service very little." It is naturally to be supposed now that the Canadian Pacific is in control of the respondent corporation that the facilities upon this railway will be greatly improved, and so far as the complaint covers deficient car service and insufficient passenger facilities, it may remain in abeyance, so that an oppor-

tunity may be given for improvement by the management, and after, say, six months, upon application by the complainants, if they find that course necessary, the Board will send one of its operating officials over the road, and will be guided by his report in directing any changes or improvements in train service and otherwise, that may be reasonable.

There is no separate express company operating over this railway, but express matter is handled by the company on its freight and mixed trains. No express tariffs have been filed, and it was said the same charges are made as are shewn in the tariffs of the Dominion Express Company. Express packages are gathered and delivered in Lethbridge by the wagons of the Dominion Express Company, and respondents pay the latter for this service; the basis of such payments was not given to us. The company is in default regarding its express business. The law is imperative in its provisions regarding the filing of express tariffs, and provides that, no goods shall be carried by express unless and until the tariff of express tolls has been submitted to and filed with the Board: section 350. "And express toll" means any toll, rate, or charge to be charged by the company, or any person or corporation other than the company to any persons for hire, or otherwise, for or in connection with the collecting, receiving, caring for, or handling of any goods for the purpose of being transported by express, or for any service incidental thereto: section 2, sub-section (9). The whole express situation is now being considered by the Board, and its result will be applicable to the express business of this company, and nothing more need now be said as to this feature of the complaint, except that the company must at once prepare and file its tariff of express tolls and comply generally with the tariff clauses of the Act.

The questions then remain as to the complaints regarding the charges made for the transportation of passengers and freight. Prior to 1907, the company had been charging five cents per mile, and by an order of the Board of July 26th, 1907, the company was directed to reduce its standard tariff to the basis of 4 cents per mile with return fares at 1 2-3 times the rate for the single

journey, and I understand the company has since been charging upon that basis.

In a report dated March 16th, 1907, the Chief Traffic Officer of the Board expressed the opinion that passenger fares should be reduced to $3\frac{1}{2}$ cents per mile, round-trip tickets to be one-sixth less. The passenger earnings for the year ending June 30th, 1906, were \$38,740.29; the passenger earnings for the year ending June 30th, 1908, were \$52,516.85. The section of the country through which this road operates is rapidly being settled and the population is increasing and we see no reason why the passenger fares south of Lethbridge over this line should be higher than those north of Lethbridge over the Canadian Pacific road; the passenger fares must be reduced to three cents per mile, round-trip tickets to be one-sixth less, and standard passenger tariffs must be at once filed carrying these reductions into effect.

The Chief Traffic Officer of the Board reports to us that "the territory in which the A. R. & I. operates is in all respects similar to that of the Canadian Pacific in Southern Alberta, and it is in my view that the A. R. & I. Co.'s freight rates, both standard and special, should not exceed those in effect for similar distances, and on similar commodities on the line of the Canadian Pacific between the Crow's Nest Pass and its connection with that company's main line near Medicine Hat." The impression I formed of the situation as developed during the argument, and from a perusal of the file and the great amount of correspondence attached to it as well as former reports of Mr. Hardwell, is in entire accord with his recommendation; and I have no doubt that it would have been much to the advantage of this company had it granted reasonable concessions upon some at least, of the matters covered by the complaint.

The order of the Board will be:—

(1) That passenger fares shall not exceed three cents per mile; round trip tickets to be sold by the company at one-sixth less. Standard passenger tariff to be filed carrying this direction into effect.

(2) That the respondent company be required, where it has not already done so, to publish and file special tariffs of freight rates between all its stations on basis that shall not exceed those of the Canadian Pacific Railway Company for the same or similar distances and on the same commodities, as are or may be put into effect on the line of the Canadian Pacific Railway between the Crow's Nest Pass and Coleridge on its main line.

(3) That the respondent company be required to put into effect a special tariff of class rates from Lethbridge to all of the company's stations, which shall not be higher than the special class rate tariff of the Canadian Pacific Railway from Lethbridge for the same or for the nearest equivalent distances.

(4) The foregoing tariff to be prepared, filed and published within thirty days.

(5) That the complaints relating to the express service and charges, furnished and made, by the respondents shall stand for disposition when the general express enquiry is dealt with; but the respondents must forthwith file their express tariff of tolls as required by the Railway Act.

(6) That if the complainants find such steps necessary, they may at the expiration of six months, renew their complaints regarding deficient car service and passenger facilities.

EXCESSIVE TOLLS—WATER COMPETITION.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.]

PLAIN AND COMPANY V. CANADIAN PACIFIC RY. CO.

(File No. 8939.)

Excessive tolls—Water competition—Compelled rate—Normal rates—Discretion of railway company—Intermediate point—Shorter and longer distances—Traffic—Important in amount—Railway Act, sec. 315(5).

On a complaint to the Board under section 315(5) of the Railway Act, that the rate on a shipment of apples from Picton to Smith's Falls was excessive as compared with the rate from Picton to Ottawa; Smith's Falls being an intermediate point located on the Rideau Canal and the distance from Picton to Smith's Falls being shorter than the distance from Picton to Ottawa.

- Held*, 1. That the complaint should be dismissed, the rate to Ottawa being a compelled rate based on water competition.
2. That a shipper could not demand less than normal rates on account of water competition which a railway company, in its own interest, did not choose to meet.

THE application was heard at Ottawa May 19th, 1909.

The applicant, in person.

E. W. Beatty, for the Canadian Pacific Ry. Co.

May 20, 1909. MR. COMMISSIONER McLEAN:—The rate charged by the Canadian Pacific Railway from Picton to Ottawa is 17 cents per hundred pounds, while the rate from Picton to Smith's Falls, an intermediate point located on the Rideau Canal, is 23 cents. It is alleged that the latter rate is excessive.

The traffic moving to Ottawa is subjected to effective water competition both by the Rideau Canal and by the Ottawa River via Montreal. The rate to Ottawa is a compelled rate based on water competition. It is the privilege of a railway, in its own interests, to meet water competition. It is not, however, the privilege of a shipper to demand less than normal rates because of such competition which the railway does not, in its own interest, choose to meet. *Lindsay Brothers v. Baltimore & Ohio South Western Ry. Co. et al.*, 16 I.C.C. Rep. 6. Opinion No. 872.

Where a railway chooses to meet water competition it is to be presumed, unless the contrary is established, that it does so because there is effective competition in regard to traffic important in amount. It is established in evidence that such a condition does not exist at Smith's Falls. The compelled rate to Ottawa cannot then be taken as the measure of the reasonableness of the shorter distance rate to Smith's Falls, and the complaint should therefore be dismissed.

The Chief Commissioner and the Deputy Chief Commissioner concurred.

INTERSWITCHING CHARGES.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

RED MOUNTAIN RY. CO. v. COLUMBIA & WESTERN RY. CO.

(File No. 3744.)

Disallowing and fixing tariffs—Interswitching charges—Through freight traffic—Reduction of tolls—Fair and proper—Higher grade ore—Higher toll—Less traffic—Absorption—Variation of order—Parties interested.

The Red Mountain Ry. Co. applied to the Board for a variation of its order fixing the tolls to be paid them for interswitching services performed on through traffic of ore from the Le Roi Mines to the "transfer track" of the Columbia and Western Ry. Co.

The Board had on the application of the Columbia and Western fixed at \$3.50 and subsequently reduced to \$3.00, per carload, the tolls for interswitching paid to the Red Mountain.

The variation to raise the tolls was sought on the ground that higher grade ore should pay a higher toll and a less movement of cars was not so profitable as a larger.

Held, 1. That the application should be refused, the conditions not having changed and the car movement considered when the order was made.

2. That the order must be held to have been properly made and the tolls to be fair and proper until the contrary was conclusively shewn.

3. *Held*, further, that the application could not be entertained because the proprietors of the Le Roi Mines who were interested parties, had not been notified.

4. That the Columbia and Western should absorb any increase in the tolls charged for interswitching.

5. That the general interswitching order of 8th July, 1908, *Canadian Manufacturers' Association v. Canadian Freight Association (Joint Switching Rates Case)*, 7 Can. Ry. Cas. 302, does not cover the present case.

THE application was heard at Nelson, B.C., on the 5th day of March, 1909.

A. H. MacNeill, K.C., for the Red Mountain Ry. Co.

J. E. McMullen, for the Columbia & Western Ry. Co.

The facts are fully set out in the judgment of the Chief Commissioner.

June 21, 1909. THE CHIEF COMMISSIONER:—The Great Northern Railway Company are the lessees of the applicants, and the Canadian Pacific Railway Company are the lessees of the respondents.

On February 14th, 1906, upon the application of the respondents for an order disallowing a tariff filed by the Red Mountain Railway Company on the 3rd of October, 1905, an order was made fixing the sum that the Red Mountain Railway Company should be paid for switching cars containing through freight traffic from the Columbia and Western "transfer track" from or to all points reached by the tracks of the Red Mountain Company to certain defined points at \$3.50 per carload. The traffic in question is ore from the LeRoi mines.

Subsequent to the above date the point of interchange had been established at Third Avenue, in the city of Rossland, and on the 16th of November, 1906, upon the application of the Columbia and Western Railway Company, the order of February 14th, 1906, was varied by reducing the toll for the services performed by the Red Mountain Railway Company to \$3.00 per carload instead of \$3.50.

Before the lastly mentioned order was made, the matter was carefully considered, and it appears that the toll was reduced by fifty cents per carload because the cost of the service by the establishment of the new transfer point was cheapened. It was on the level and within the terminals, and the switching movement was shortened by some 1,800 feet. We must, of course, regard the order of the 16th November, 1906, as having been properly made, and must also regard the toll fixed by that order at \$3.00 per car as being a fair and proper charge for the services performed. It therefore rests upon the present applicants to satisfy the Board that the situation has so changed that a variation of that order would be proper, the services now being performed are the same, that is, there has been no further change of the transfer point.

Mr. MacNeill, for the applicants, contended that the ore now being shipped from the mines was of a higher grade than that shipped in 1906, and so could stand a higher toll; but those most interested in these tolls, viz., the Le Roi proprietors, were not notified of this application, and as pointed out at the hearing,

the Board could not entertain an application to increase these tolls without all interested parties having an opportunity of being heard. We are still of the opinion, as expressed at the hearing, that the general interswitching order does not cover this case. In 1906, some twelve or fifteen cars per day were handled, as I understand, in one shunt from the bin to Third Avenue. Now, only two or three cars per day move, and it is said that while \$3.00 might not have been unfair upon a movement of twelve or fifteen cars, it is upon a movement of only two or three; but upon looking carefully into all the facts that were before the Board in 1906, and further considering the report of the Chief Traffic Officer, upon whose recommendation that order was made, as well as earlier reports upon the same matter, it nowhere appears that the number of cars per day that might or would be shipped entered into the consideration of the Board. I shall not be misunderstood as saying that the volume of traffic is not a material factor in fixing a rate, but am stating only that I cannot find in the material before the Board that the parties had heretofore urged this point in this case.

To find now that the toll should be increased would be to find that the toll of \$3.50 fixed by the first order was too low, because the further reduction of 50 cents per car was made solely upon the lessened expense of the service.

I am not able to conclude from the facts I have been able to gather that the order of February 14th, 1906, should not have been made, and it seems to me that if that were a proper order this application cannot be granted.

It was stated by counsel for the respondents that the tariff of the Columbia and Western on this ore to the Trail smelter was 20 cents per ton, in addition to the \$3.00 switching charge, so any increase in the switching charge, in the absence of the proprietors of the mine, would have to be absorbed by the Columbia and Western; on a car of 30 tons, from the bin to the smelter. the charge would be \$9.00, of which \$6.00 goes to the Columbia and Western and \$3.00 to the Red Mountain. There are no facts

before us from which it can be said this is an unfair division. We are of opinion the application fails.

Mr. Commissioner McLean concurred.

NOTE.—See *Anchor Elevator, etc., Co. v. Canadian Northern R.W. Co. et al.*, page 175, *supra*, where it was also held that the provisions of the general interswitching order of 8th July, 1908, only apply to terminal and not to intermediate points.

STOP-OVER PRIVILEGES.

CANADA.] [BOARD OF RAILWAY COMMISSIONERS.

MONTREAL BOARD OF TRADE (TRANSPORTATION BUREAU) AND THE
FULLERTON LUMBER CO. V. CANADIAN PACIFIC AND
GRAND TRUNK RY. COS.

(*Cartier Stop-over Case, No. 8659.*)

Stop-over "for orders" privileges—Re-directed—Instructions—Point of destination—Through rate—Demurrage charge—Stop-over charge—Tariff disallowed—Reasonable rate.

Upon a complaint against a charge of one cent per hundred pounds made by the Canadian Pacific Ry. Co. on grain and grain products in carload lots consigned to Cartier "for orders" and a like charge made by the Grand Trunk Ry. Co. on lumber and forest products in carloads from British Columbia consigned to Sarnia Tunnel "for orders."

It appeared that the railway companies had previously made no charge for this stop-over privilege, except a per diem charge of 25 cents a day for the first 48 hours' delay and the usual charge for demurrage of \$1.00 per day on cars delayed over 48 hours, and shippers were allowed to ship freight at a through rate to a certain intermediate point and there await further instructions from the consignee as to final point of destination.

Held, 1. That the tariff imposing the additional stop-over charge of 1 cent per hundred pounds should be disallowed.

2. That this stop-over privilege was originally taken into consideration as an element in fixing a reasonable per diem rate and that a stop-over charge of 25 cents per diem per car for the first 48 hours, and the car service toll of \$1 a car for each additional 24 hours be substituted for the charge complained of.

THE application was heard at Montreal on the 23rd day of December, 1908.

W. S. Tilston, for the Transportation Bureau of the Montreal Board of Trade.

James E. Walsh, for the Fullerton Lumber Company.

E. W. Beatty, for the Canadian Pacific Ry. Co.

W. H. Biggar, K.C., for the Grand Trunk Ry. Co.

The facts are fully set out in the judgments of the Board.

December 26, 1908. THE CHIEF COMMISSIONER:—Complaints are made, first, against an additional charge of one cent per 100 lbs. imposed by the Canadian Pacific Railway Company at Cartier, Ont., on Western grain and grain products, in carloads, consigned to Cartier, "for orders," under supplement No. 13, effective September 1st, 1908, to the company's tariff C.R.C., No. E. 678, and still in force by supplement No. 15 to the same tariff.

Second, against a like charge imposed by the Grand Trunk Railway Company at Sarnia Tunnel, Ont., on lumber, shingles, and other products, in carloads, originating in British Columbia, and consigned to Sarnia Tunnel, Ont., "for orders," under the company's tariff C.R.C. No. E. 1394, effective September 8th, 1908.

At Cartier and Sarnia Tunnel the traffic is held by the companies for orders for re-consignment to Eastern points. Before September 1st, 1908, the Canadian Pacific Railway Company made an extra charge for holding Western grain and grain products for orders either at North Bay or at Cartier, other than the so-called per diem charge, which, for the purpose in question, was fixed at 25 cents a day, and the customary demurrage on cars delayed over 48 hours; at the tunnel prior to September 8th, 1908, it has not been shewn that the Grand Trunk made any charge whatever.

We had the benefit of hearing the views of the Traffic Officer of the Board as well as counsel for both the Canadian Pacific and Grand Trunk. The grounds for making the charge are

said to be that benefit is conferred upon the shipper and some additional expense and trouble imposed upon the carrier. I think it is a clear advantage to the shipper to have the privilege of consigning to these stop-over points for sale, and perhaps the carrier is also put to some small expense by reason of granting the privilege; but the difficulty in my mind of upholding the charge of 1 cent per 100 lbs., is that the service has hitherto been granted without such charge, and so I think it fair to assume that in establishing the rate originally, this service was taken into consideration as one of the elements in fixing a reasonable rate. The carrier is put to no more trouble or expense, and the shipper receives no greater benefit from the stop-over at Cartier than obtained at North Bay, so I am at a loss to understand why a charge should be made for a service that in the past has been considered either not worth charging for, or that had been included in fixing the rate.

What has been said of grain stop-over at Cartier applies to the forest products stop-over at Sarnia, and I think both these tariffs should be disallowed and the original 25 cent charge substituted.

Had it been shewn affirmatively that in establishing the original rate this convenience to the shipper had not been considered, my views upon the present application would have been different, although I don't agree that 1 cent per 100 lbs. would be a reasonable charge.

The Deputy Chief Commissioner concurred.

January 2, 1909. THE ASSISTANT CHIEF COMMISSIONER:—The Transportation Bureau of the Montreal Board of Trade complain against the additional charge of one cent per hundred pounds imposed by the Canadian Pacific Railway Company at Cartier, Ontario, on Western grain and grain products, in carloads consigned to Cartier, "for orders," under supplement No. 13, effective September 1st, 1908, to the company's tariff C.R.C. No. E. 678, and still in force by supplement No. 15 to the same tariff.

It has been the custom for many years, for the railway company to permit grain shippers sending cars from Fort William east, to have the cars billed to some point on the line of railway, formerly North Bay (now Cartier), "for orders." Upon arriving at the stop-over point the car is then held, subject to further instructions from the consignee as to the point of destination. The privilege is, undoubtedly, of substantial value, as the shipper in this way is enabled to get his grain some 500 miles nearer its destination without having to name it at the time of shipment.

As the through rate is charged for transportation to the final destination, the company only makes the stop-over charge to pay itself for the services rendered at Cartier. If the consignee's instructions have not been received at Cartier prior to the arrival of the train containing his car to be re-directed, it is placed on a siding and is held by the railway company until his instructions are received. The railway company must, of course, break its train and perform a special shunt if the car is to be put on the siding for orders. As this is a substantial service, I think the railway company is entitled to a fair remuneration.

At present the railway company is charging for this additional service one cent per hundred pounds, so that the charge per car may vary from four to eight dollars. I think the minimum \$4.00 is too high a charge for the service rendered.

I, therefore, am of opinion that the present tariff should be disallowed, but I would approve of a tariff containing a charge of one dollar per car for each day of twenty-four hours or fraction thereof, for stop-over "for orders" privileges. In fixing this amount, I have taken as a fair basis of value the dollar charge per car per day which has been established as a fair allowance for the use of a car standing on the track in the "Canadian Car Service Rules" as a fair basis of value.

I would not differentiate between the case, where the instructions for re-shipment arrive at Cartier before the car, and the

case where the car arrived before the instructions, although the service rendered by the railway company in the second case would be more than in the first; because, if the question as to which arrived first at Cartier became an important element in determining the charges, there would, undoubtedly, be confusion and friction between the shipper and the railway company. As pointed out by the Chief Traffic Officer of the Board, it would be fair to set off the advantages to the railway company in the first case against the extra service in the second case, and merely allow the standard charge of one dollar per car per twenty-four hours in all cases.

When we had the Cartier stop-over question before us at the Montreal sittings, we were not given any evidence with reference to the Fullerton Lumber Company complaint against the Grand Trunk for stop-over charges at Sarnia Tunnel. If the principle involved in the Sarnia case is similar to the Cartier case, then this judgment will also apply to the Sarnia case.

Upon the hearing of counsel for the Transportation Bureau of the Montreal Board of Trade, the Canadian Pacific Railway Company, the Dominion Millers' Association, and the Canadian Manufacturers' Association, the evidence adduced, and what was alleged—

It is ordered that the said charge of one cent per 100 pounds imposed by the Canadian Pacific Railway Company at Cartier, Ontario, on Western grain and grain products in carloads, consigned to Cartier, "for orders," under supplement No. 13, effective September 1st, 1908, to the company's tariff C.R.C. No. E. 678, and still in force by supplement No. 15, to the same tariff; and by the Grand Trunk Railway Company at Sarnia Tunnel, on grain and grain products, in carloads, originating in Western Canada, destined to points in Eastern Canada, and routed via Chicago, Chicago junctions, or Milwaukee, to Sarnia Tunnel, Ontario, "for orders," under supplement No. 3 to the company's tariff C.R.C. No. E. 1101, be, and the same is hereby, disallowed, and a "stop-over" charge of twenty-five (25) cents per car a day

for the first forty-eight hours, and the Car Service Toll thereafter, substituted therefor.

And it is further ordered that this order become effective not later than the fifteenth day of February, 1909.

TERMINAL CHARGES—ABSORPTION—COMPETITION.

MONTREAL PRODUCE MERCHANTS' ASSOCIATION v. GRAND TRUNK AND CANADIAN PACIFIC RY. COS.

(File No. 5698.)

Export traffic—Terminal charges—Absorption—Separate and joint—Rail and ocean bill of lading—Competition between ocean ports and carriers—United States and Canada—Inward cartage—Unreasonableness and unjust discrimination—Refunds—Parity in tolls—Advance in freight tolls—Competition of markets—Increase in cartage charges—Increased costs of service—Retroactive order.

Application (1) that the exporter of cheese in Montreal should be placed upon as favourable basis as to terminal charges at the port of Montreal on his export traffic as his competitor west of Montreal, (2) that freight tolls on cheese should be put on a parity with those on bacon, (3) complaining of alleged advances in freight tolls.

It appeared that cheese may be shipped direct to transatlantic ports from Ontario points via Montreal on a joint rail and ocean bill of lading, or shipment might be made on a separate rail and ocean bill of lading to Montreal for storage and subsequent export.

In the first case cheese shipments are switched direct to the steamship piers, the wharfage and Port Warden's fees being absorbed by the railway companies to meet the competition between Canadian and United States ports and carriers.

In the second case the cheese is carted from the cars to the warehouse of the exporter and again from the warehouse to the steamship piers.

The Montreal exporter is charged for inward cartage, i.e., from cars to warehouse, wharfage and Port Warden's fees, these two latter charges are absorbed in the case of his western competitor.

Held, 1. That the Montreal exporter should not be placed upon a more favourable basis than his western competitor.

2. That no comparison could be made between switching charges and inward cartage charges in order to reduce the latter, these cartage charges not shewn to be unreasonable and unjustly discriminatory; the portion of the complaint as to inward cartage charges should be dismissed.

3. But, *held*, also that so long as the port charges are absorbed on shipments on joint rail and ocean bills of lading these charges should also be absorbed on shipments on separate rail and ocean bills of lading for subsequent export, as the services are identical in each case, and that a tariff embodying these provisions should be filed.

4. That the application to put cheese and bacon on a parity should be dismissed, this being a phase of the competition of markets, and the railway companies have it in their discretion whether or not to make tolls to meet the competition of markets.
5. That the complaint of the advance in freight tolls should be dismissed, the cartage charges being really attacked and it has been shewn to be due to increased cost of service which the shipper or consignee does not pay entirely but a portion is paid by the railway companies.
6. That the application for refunds should be refused, being only allowed when provided for in the tariffs, and the Board has no power of retroactive action.

Brant Milling Co. v. Grand Trunk Ry. Co. (The Brant Milling Co.'s Case), 4 Can. Ry. Cas. 259; *Lancashire Patent Fuel Co. v. London & North Western Ry. Co.*, 12 Ry. & C. Tr. Cas. 79, and *Lasalle Paper Co. v. Michigan Central Ry. Co.*, 16 I.C.C. Rep. 149, followed.

The application was heard at Montreal, December 22nd, 1908.

W. S. Tilston, R. W. Ballantyne, Jas. Alexander and Arthur Hodgson, for the applicants.

M. K. Cowan, K.C., for the Grand Trunk Ry. Co.

E. W. Beatty, for the Canadian Pacific Ry. Co.

The facts are fully set out in the judgment of Mr. Commissioner McLean.

June 17, 1909. MR. COMMISSIONER McLEAN:—The subject matter of this application falls under three subdivisions which are, in order of importance as follows:—

(1) Application that the exporter of cheese in Montreal, be placed on as favourable a basis with regard to rates and charges in his export traffic, as his competitor west of Montreal.

(2) That freight rates on cheese be placed on a parity with those on bacon.

(3) Complaint in regard to alleged advances in freight rates.

I.

The material point in the complaint as to rates and charges is that of terminal expenses at the port of Montreal. There is involved in the complaint not only the question of a basis for

the future but also the matter of refunds on such basis, covering the export shipments of the years 1907 and 1908. While butter and eggs are also handled for export through Montreal, it is admitted that since practically all the cheese reaching Montreal goes into the export trade, it may for the purposes of the application before us be treated as peculiarly an export commodity which may be singled out for special treatment.

Cheese may be shipped direct from points in Ontario, via Montreal to transatlantic ports on a joint rail and ocean bill of lading, composed of the rail rate to Montreal plus the ocean rate to destination. The shipment may also be made on a separate rail and ocean bill of lading to Montreal for storage and subsequent export. At one time the railways applied a different rate basis as between the two methods of shipment, but at some time prior to 1904 the rail rate was made the same in both cases.

While the rail rate is the same, complaint arises in connection with the charges made for terminal services on the shipments to Montreal which are stored there and subsequently exported. In the case of the shipments on a joint bill of lading the rate to destination is made on the basis of competition via United States ports. At Montreal these cheese shipments are switched direct to the steamship piers. Taking the Grand Trunk—which affords a sufficiently characteristic example—part of this switching is done by the railway over its own tracks, from the Turcot yards to the foot of McGill street at which point it is turned over to the Harbour Commissioners who switch it to the proper pier. At the pier the car is unloaded into the steamship shed by the Grand Trunk employees at an expense of 22½ cents per ton. All the charges in connection with this switching movement as well as the wharfage and Port Warden's fees are absorbed by the railway company. All of this absorption is forced on the railway to meet the competition of United States ports and carriers leading thereto. The attraction of this trade to the Canadian port is in the interest of the development of Canadian trade channels.

The situation in connection with the shipments on the separate rail bill of lading to Montreal requires analysis. Taking again the situation arising in connection with the Grand Trunk, the following conditions exist. None of the cheese warehouses in Montreal are located on a siding. The cheese shipped in on a local bill of lading to these warehouses is switched from the Turcot yards through the terminal yards to the freight shed at Bonaventure. Here it is unloaded by the company's men and delivered to its cartage agents. The cost to the company of handling at Bonaventure was stated in evidence to be 30 cents per ton. The company charges the consignee, under the general cartage tariff in force in Montreal and various other points, 2 cents per 100 pounds for cartage. When this cheese is exported it must be carted to the steamship pier from the warehouse of the exporter at a cost of 1.94 cents per 100 pounds. In addition he pays the Harbour Commissioners' wharfage charge of 20 cents per short ton and the Port Wardens' fees—2 cents per short ton. The latter payment is equivalent to regarding the cheese as originating at Montreal and therefore not subject to the competitive conditions applying on the other traffic. In all the terminal charges of the Montreal exporter amount to 5.04 cents per 100 pounds.

While the application of the Montreal exporters is for an allowance of the inward cartage charges and the wharfage dues and Port Wardens' fees, they recognize that practically none of the cheese handled on through bills of lading is carted to the steamship pier and that the switching costs are lower than those for cartage. On the portion of the switching performed by the Harbour Commissioners there is a charge of .83 of 1 cent per 100 pounds. The applicants therefore average the charges as follows:—

Cartage....2.00 cents, Port charges..1.10c. = 3.10c.

Switching... .83 cents, Port charges..1.10c. = 1.93c.

5.03c.

dividing by 2 gives an average = 2.51c.

It is asked that this allowance shall be made in the future so long as the rates and charges are on the present basis, and that there shall also be a refund on this basis for the years 1907 and 1908.

The rail rate being the same to Montreal in either case, it is material to consider the additional charges to shippers or consignees as well as the net earnings obtained by the railway.

If an Ontario point such as Hastings, which is tributary to Belleville, is taken, the following results will be obtained on the basis of 1908 figures:—

(A) On joint rail and ocean B/L to Europe stored in transit at Belleville, rail rate Hastings to Montreal.....	23.00c.
Stop-over at Belleville	2.00c.
	<hr/>
	25.00c.

(B) On separate rail and ocean B/L. stored in transit at Montreal.	
Rail rate Hastings to Montreal	23.00c.
Cartage depot to warehouse by Ry. Co.....	2.00c.
Cartage warehouse to wharf by exporter.....	1.94c.
Port charges	1.10c.
	<hr/>
	28.04c.

which places the Montreal exporter at an apparent disadvantage of 3.04 cents per 100 pounds.

When the question of the cost to the Grand Trunk of handling the two classes of traffic is considered, different conditions present themselves. Out of the 25 cents received on the shipment from Hastings, the railway absorbs the following:—

Port charges	1.10c.
Harbour Commissioner's switching, charge.....	.83c.
Cost of wharfage handling, 22½ cents per ton...	1.13c.
	<hr/>
	3.06c.

A deduction of 3.06c. making the net earnings 21.94c. per 100 pounds.

In the case of the cheese stored at Montreal, the gross receipts including inward cartage totals 25 cents per 100 pounds. From this the following deductions must be made:—

Cost of inward cartage to railway.....2.97c.

Cost of freight shed handling, 30 cents per ton...1.50c.

4.47c.

This deduction of 4.47 cents from the gross receipts leaves the net earnings at 20.53 cents or 1.41c. less than on the shipments on the through bill of lading. If, in addition, the railway has to absorb the 2.51c. per 100 pounds as asked for by the applicants, the net receipts will be 3.92c. per 100 pounds less than in the case of the shipments on the through bill of lading.

The applicants alleged that the inward cartage could be performed at a rate of 40 cents per ton or 2 cents per 100 pounds. It appears that under the arrangements the Grand Trunk have with their cartage agents, they pay 2.97c. per 100 pounds and that they absorb .97 of 1 cent. The applicants stated that they were willing to do their own inward cartage and the railways stated their willingness to accept such an arrangement. This would absolve the railway from the necessity of absorbing .97 of 1 cent. The company's net earnings in the cheese shipped out after storage in Montreal would then be .44 of 1 cent less than where shipment is made on a through bill of lading. If the 2.51c. were absorbed, then the net earnings would be 2.95c. less.

It cannot be contended that the Montreal exporter has any right to be placed on a more favourable footing than his competitor who ships on a through bill of lading. If the railway performs for the Montreal exporter special services which cost more than those rendered to his Ontario competitor, or if the situation of the former necessitates the performance of additional and more expensive services, it is manifestly unfair to demand that the

railway should absorb the difference. A comparison between the switching charge and the cartage charge is not justifiable. Furthermore, the switching of the through cheese is incidental to the through shipment. So far as the inward cartage charges are concerned they are not shewn to be excessive. The 2 cents per 100 pounds charged on the inward shipments is admitted by the applicants to be the actual cost of service at which they themselves could move those shipments.

While the railways did prior to 1904 absorb the inward cartage charges, this is not conclusive that the charges at present are unreasonable or discriminatory. The fact that the railways did in 1905 and 1906, with the permission of the Board, refund the inward cartage charges on cheese subsequently exported, depended in my opinion on special conditions which are not pertinent to the present application.

The application in regard to the inward cartage could only be granted if it were shewn that these rates were either unreasonable or discriminatory. The applicants have not established their unreasonableness; the evidence of the respondents has rebutted the presumption of discrimination. This portion of the complaint should therefore be dismissed.

The port charges are the only ones common to both cases. Recognizing that the Montreal exporter must stand the additional cost of various services which are incidental to his location, it is patent that in respect of the question of the absorption of port charges the services are identical. The shipments whether billed through or for storage at Montreal are subject at the initial point to the competition of United States ports. The fact that the point of inspection and storage is located in the one case at Belleville, while in the other it is in Montreal, does not create any such dissimilarity of circumstances as to justify absorption in one case and not in the other.

In the view I have taken of the inward cartage charges it is not necessary to deal at length with reparation. But, in view of the earlier action of the Board in this matter, dealing with the question of refunds during 1905 and 1906, some reference must

be made to the matter. It is true that under special circumstances, which were recognized as being explicitly limited to the facts of a particular case, and to the readjustment necessary in changing from the conditions existing prior to 1903 to those established under the Railway Act as amended in that year, the Board did see fit to authorize a refund. Reference was made during the hearing to the fact that the late Chief Commissioner Killam used in his judgment of June 19th, 1906, the following language:

“as to the future, I see no reason why such a reduction might not be properly made in respect to cheese which is the only commodity as I understand, now intended to be covered by the arrangement.”

This is not, however, pertinent to the present application, because it was based on the assumption, subsequently recognized as erroneous, that the tariffs in force had provided for such refunds. In Order No. 1995, issued November 19th, 1906, it is recited that the order went by consent. The Order No. 2570, of February 15th, 1907, in regard to refunds on traffic originating south and east of Montreal, was also permissive. It is clear that whatever action was then taken has no bearing on the present application where we are asked to order a refund not dealt with by the tariffs legally in force. In this connection the words of the late Chief Commissioner, during the hearing at Montreal on January 2nd, 1907, regarding the refunds on cheese traffic originating south and east of Montreal, are pertinent:—

“it seems to me, I must say, that the Board cannot insist on refunds where railway companies have collected only the tolls which the tariff existing at the time authorized them to charge.”

Evidence Volume 41, p. 207.

Attention may also be directed to his decision in the *Brant Milling Co.* case that allowances for free cartage must be covered by tariff.

4 *Can. Ry. Cas.* 259, at p. 271.

It follows then that while the Board orders absorption of the port dues, it has no power to make such action retroactive.

II.

CHEESE AND BACON RATES.

It is alleged that these are complementary commodities and that the price of cheese is regulated in England by that of bacon. It is urged that this should be considered in Canada in fixing the rate basis. The alleged competition between these food products may exist. At the same time it must be recognized that it is a competition not between two products of Canada in the English market, but between these products produced in different countries and selling in the English market, which is in reality a world market. If this principle is to be recognized as fixing a rate basis, there is no reason why a whole range of commodities not named in the complaint, and which might under some circumstances be competitive with cheese, should not also be considered. The whole matter is in reality a phase of the competition of markets. It is in the discretion of the railway whether it shall or shall not make rates to meet the competition of markets.

Lancashire Patent Fuel Co., Ltd. v. London & North Western Railway Co. et al., 12 Ry. & C. Tr. Cas. 79.

La Salle Paper Co. v. Michigan Central R.R. Co. et al., 16 I.C.C. Rep. 149.

The same principles apply here as in the case of water competition.

This phase of the complaint should be dismissed.

III.

THE COMPLAINT OF THE "GREAT ADVANCE IN FREIGHT RATES WHICH HAS TAKEN PLACE IN THE PAST TWO OR THREE YEARS."

Statements have been submitted regarding rate changes in the period 1890 to 1907. No attempt is made to prove these rates unreasonable in themselves. The central point of attack is in

reality that of cartage charges. It is true that there has been an increase in cartage charges, but this it is shewn has been due to increased cost of service. Further, the shipper or consignee does not pay the entire cost of service. An example of this has already been given in connection with the matter of cheese. The Grand Trunk pays the Shedden Company for teaming to and from its Bonaventure freight sheds within the corporate limits of the city of Montreal 59.4 cents per ton, while it charges the shipper or consignee 40 cents. No evidence was submitted to shew that the shipper or consignee could have this service performed at any lower figure. The Canadian Pacific contract with its cartage company calls for a higher figure than that of the Grand Trunk with its cartage company, while it charges the shipper or consignee no greater sum than does the Grand Trunk. The cartage charges have not been shewn to be unreasonable, nor have they been attacked as discriminatory as between those availing themselves of them. This phase of the complaint should be dismissed.

To recapitulate:—

(1) The application for absorption of inward cartage charges should be refused.

(2) The railway companies should on cheese shipped to Montreal on separate rail bill of lading, absorb the harbour dues when such cheese is subsequently exported. Such absorption should continue so long as it is applied in the case of cheese shipped on a joint rail and ocean bill of lading to Europe. Provisions to make this effective should be filed and published in the railway tariffs within thirty days from the date of the order making this judgment effective.

(3) The applications for refunds covering the seasons 1907 and 1908 should be refused.

(4) The application that cheese rates should be placed on a parity with bacon rates should be dismissed.

(5) The portion of the complaint dealing with the alleged "great advance in freight rates which has taken place in the last two or three years" should be dismissed.

The Chief Commissioner and the Assistant Chief Commissioner concurred.

NOTE.—The following is the opinion of the late Chief Commissioner, Hon. A. C. Killam, referred to above in the judgment of Mr. Commissioner McLean, stating the principles upon which refunds are allowed.

We think that the order of the Board must be considered to be confined only to the question submitted by the parties, which was with reference to the traffic originating at points west of Montreal. It is only that, that apparently the railway companies have consented to make refunds on, and we only dealt with the matter at that time upon the footing that it was a matter of refund that they were willing to make if the Board thought they could properly do so. The question as to whether the Board should insist upon them making it apply to others, is a different question; and, it seems to me, I must say, that the Board cannot insist on refunds where railway companies have collected only the tolls which the tariffs existing at the time authorized them to charge. The question whether those tariffs should continue in that way, and whether that difference should be made between shipments arising in the West, and those arising in the East, is another question.

EXCESSIVE DAMAGES—PERSONAL INJURIES.

ONTARIO.]

[COURT OF APPEAL.

BRADENBURG V. OTTAWA ELECTRIC R.W. CO.

(19 O.L.R. 34.)

Damages—Personal Injuries—Permanent Disability—Pecuniary Loss—Quantum—Judge's Charge—Address of Counsel to Jury—Mentioning Sum Claimed.

The plaintiff, though not originally trained as a mining engineer, had by long experience become an expert examiner of gold mining locations; was 37 years of age, physically strong and healthy, and of excellent character. He was in receipt of a salary of \$6,000 a year from employers interested in gold properties, who spoke very highly of his capabilities and prospects. He was permanently disabled by injury sustained on one of the defendants' cars through their negligence. A jury awarded him \$30,000:—
Held, on appeal, that the amount was not so excessive as to entitle the defendants to a new trial.

Held, also, that by a reference in the charge to the jury to \$25,000 as a sum which would not appear large to a man earning \$6,000 a year, and by a mention of the sum claimed as \$50,000, the jury were not, reading the charge as a whole, left under the impression that they were directed as to the amount they were to fix.

Held, also, that counsel for the plaintiff, in opening to the jury, mentioning the sum claimed in the statement of claim, was not so objectionable as to be a ground for granting a new trial.

Judgment of Anglin, J., affirmed.

THIS was an appeal by the defendants from the judgment of Anglin, J., upon the findings of a jury, at Ottawa, on January 12th, 1909, in favour of the plaintiff for the recovery of \$30,000 damages, in an action for personal injuries.

The appeal was on the ground of excessive damages and misdirection, in the circumstances mentioned below, and was argued on April 28th, 1909, before Moss, C.J.O., and OSLER, GARROW, and MACLAREN, JJ.A.

I. F. Hellmuth, K.C., and *F. H. Chrysler*, K.C., for the appellants.

Wallace Nesbitt, K.C., and *H. Fisher*, for the plaintiff.

June 23, 1909. The judgment of the Court was delivered by Moss, C.J.O.:—This action is for the recovery of damages for injuries sustained by the plaintiff while riding as a passenger in a street car belonging to the defendants. In their statement of defence the defendants put in issue the charges of negligence causing the accident, but at the trial they admitted liability, and the only matter submitted to the jury was the amount of the damages. The jury awarded \$30,000, and the defendants obtained leave to appeal directly to this Court under the statute in that behalf.

At first sight the verdict appears large, but, when the circumstances as disclosed by the testimony are considered, the case assumes a different aspect.

The facts put in evidence on the part of the plaintiff were not seriously questioned, the principal witnesses in support of his own testimony were not even cross-examined, and no rebutting testimony was offered by the defendants.

At the time of the accident the plaintiff was in the employment of an association largely interested in Klondyke gold proper-

ties, and was in receipt of a salary of \$6,000 per annum. He was then 37 years of age, physically strong, healthy and active. Though not originally trained as a mining engineer, he had, by his work and experience in mining occupations in South Africa, Australia, and the Yukon, specially qualified himself as a prospector, a judge of gold-bearing soil, and an expert in examining and testing mining locations in and about the Klondyke and Yukon districts. The work he was engaged in required superior knowledge and skill of an exceptional kind, as well as undoubted probity of character. His employers had the fullest confidence in him, and in their dealings with mining properties relied and acted upon his reports. His value to his employers was increasing every year. His salary had reached \$6,000, which Mr. Treadgold, one of his employers, testified was a very ordinary salary for an ordinary mining engineer. The same witness testified that the plaintiff had a value far higher than that of the ordinary mining engineer, that he had developed, and was sure to have increased his salary, and that there was an absolute certainty of his being wanted by them for at least five years for exactly the same kind of work; and there is no reason to doubt that, as the plaintiff testified, he had every prospect of continuous employment, and had a bright future before him in his chosen vocation, subject, of course, to the contingencies of life to which all mankind is subject.

For reasons which appear fully in the evidence, these prospects have been hopelessly blighted. He has been discharged from his employment, and he seems wholly unqualified for any other kind of remunerative work. His employers paid his salary for about fifteen months after the accident, hoping that in time he might be able to resume the work he had been doing, but all expectation of that being the case has ended. He is now without employment or hope of any.

He necessarily endured considerable pain and suffering while under treatment and during the period of recovery, and he incurred expenses to the amount of at least \$1,200, and there is the probability of some further outlay from time to time.

It is, of course, impossible to get at the elements upon which the jury computed the amount of their verdict, but it ought to be assumed that these two items were included in those considered.

In regard to the pecuniary loss actually resulting from the injuries, the learned trial Judge, in a fair and moderate charge, impressed upon the jury that they were only to allow to the plaintiff what would be a fair and reasonable compensation for the injury sustained and the consequences that followed; and that, in considering the matter, they were to take into account what he would have probably earned in the future, having regard to the contingencies of his engagement and the chances of disease or accident or of his employment being cut off by some or one of the many causes that might arise to bring about such a condition of affairs.

There is no reason for saying that the learned trial Judge failed to instruct the jury in accordance with the decisions of the Courts in England and this Province.

In *Johnston v. Great Western R.W. Co.*, [1904] 2 K.B. 250, the circumstances of which resemble the present case in some material respects, the plaintiff, a trained marine engineer, was injured by an accident on the defendants' railway in such a way as practically to put an end to all chance of his ever rising in his chosen profession, but not so as wholly to incapacitate him for some kinds of work, and the jury awarded £3,000 damages. On motion against the verdict as excessive, it was upheld by the Court of Appeal. Vaughan Williams, L.J., said (p. 258): "It is, no doubt, very difficult in the present case to estimate the damages, but I think that, taking the evidence as a whole, it is not unreasonable to say that the jury were entitled to take in to consideration as a material and substantial matter the possibility that the plaintiff would never be able to accept the position of a superintending marine engineer. . . . What, then, ought we to do if there is evidence which would justify a jury in coming to a conclusion that it was extremely doubtful whether the plaintiff would ever be able to fill such a post? Apparently from the evidence the position

of a superintending marine engineer is a well-paid position. . . . Under these circumstances it is extremely difficult to form any positive opinion as to the amount of the difference in the plaintiff's prospective earnings—the difference between what he would have got if there had been no accident and what he would be able to get since the accident; and I do not see my way, by reason of the amount of the damages or of the evidence, to say that the jury have taken into consideration either topics or a measure of damages which they ought not to have taken into consideration. I cannot say that they have disregarded the rule laid down in *Rowley v. London and North Western R.W. Co.* (1873), L.R. 8 Ex. 221, that the jury may not properly assess as damages a sum of money equal to the present price or value of an annuity equal to that income which would probably have been earned by the plaintiff but for the accident."

Every word of this seems appropriate to the present case.

It is urged that the jury may have been improperly influenced by that part of the charge in which the learned trial Judge, in directing the attention of the jury to the consideration of what would be a fair and reasonable compensation, mentioned \$25,000 as a sum that might appear large to a man who was earning only a few hundred dollars a year, while to a man earning \$6,000 a year it was not so much, and also referred to the sum claimed as \$50,000. But, reading the charge as a whole, and that is the proper manner to deal with it, and having regard to the further explanations given when the jury were recalled, it seems plain that they were not left under the impression that they were directed as to the amount they were to fix. They were clearly instructed, and doubtless fully understood, that it was only by way of illustration that any sum was spoken of, and that they were not to consider it as an instruction or even an indication of the Judge's own view.

It was further objected that counsel for the plaintiff, in opening to the jury, should not have named the sum claimed in the statement of claim.

It is not easy to see how the bare mention of something that is fully set out in a pleading can be supposed unduly to affect

the mind of a jury. One can scarcely believe that twelve intelligent men could be misled or influenced by a mere statement of that kind. In this Province it has not been considered objectionable to inform the jury as to the amount of damages claimed: see *Misner v. Toronto and York Radial R.W. Co.* (1908), 11 O.W.R. 1064, at p. 1068. And it is questionable whether to-day the Courts in England would regard the incident so seriously as in the instance referred to by Lord Halsbury in *Watt v. Watt*, [1905] A.C. 115, at p. 118, though they may still discountenance the practice.

The appeal must be dismissed with costs.

NOTES.

Recent cases on damages for death and personal injury.

The quantum of damages is a matter depending rather upon the facts of each case than on questions of principle, but in order to shew the recent trend of decisions on the point the following resume of decisions may be useful.

Where plaintiff a milk contractor had his foot run over and almost taken off in consequence of which the foot and part of the leg were amputated, on a second trial the damages were increased from \$3,500 to \$6,500 and this verdict was upheld by the Supreme Court of the North-West Territories: *Hansen v. Canadian Pacific R.W. Co.* (Alberta, 1906), 7 Can. Ry. Cas. 429, and by the Supreme Court of Canada, *ibid.* p. 441, and leave to appeal was refused by the Privy Council in July, 1908.

A master cannot recover damages for an injury which caused the immediate death of one of his servants nor can a father under the Fatal Accidents Act recover the funeral expenses of an unmarried daughter living with him and killed by defendants' negligence: *Clark v. London General Omnibus Co.* (1906), 2 K.B. 648.

A farmer brought action for the death of his son in which he recovered \$2,000 at the trial, the evidence shewed that the deceased was to have the farm on the father's death, that in the meantime they were to be partners and the son was to get what he needed out of the common fund. It was said by Meredith, J.A., that the plaintiff had proved no pecuniary loss but the

action was dismissed by a majority of the Court of Appeal for Ontario on other grounds: *Moir v. Canadian Pacific R.W. Co.* (1907), 7 Can. Ry. Cas. 380.

The principle of the apportionment of damages to be made under Lord Campbell's Act was considered by Riddell, J., in *O'Donnell v. Canadian Pacific R.W. Co.* (1908), 12 O.W.R. 110. There a sum of \$4,500 allowed as damages for the death of a brakeman was to be divided between a widow and her infant children. The deceased had left an estate of \$9,900 in addition which under his will had passed to the widow and the Judge mentioned that "in estimating the amount of pecuniary loss that fact that by the same circumstances which caused her pecuniary loss she also received pecuniary benefit must have some weight." He, therefore, allowed her \$750 and divided the balance amongst the children as follows:—

Ernest, aged 18, a drug clerk.....	\$200.00
Leonard, aged 16, at business college.....	200.00
William, aged 14, at school and desiring to teach.	400.00
Vincent, aged 12.....	400.00
Mary, aged 10.....	500.00
Clarence, aged 8.....	700.00
Vivian, aged 3.....	1,350.00

Total to children.....\$3,750

Out of this sum, an order for maintenance was granted whereby annual amounts became payable to the widow for the support of her children until further order. This case is useful as shewing the method usually adopted in making apportionments amongst members of a family.

The plaintiff a switchman employed by the defendants had his hand caught between the couplings of two cars and in consequence lost the thumb of his right hand. Clement, J. (British Columbia) in assessing damages, says, "with regard to the amount the plaintiff is entitled to recover for the pain and suffering incurred and the expense he was put to, there is no evidence that there was any. He is entitled to recover for the loss of his earning power through life owing to the loss of the thumb of his right hand, to damages for the fact that he has to go through life not as good as other men; he goes through life with a sense of disfigurement; that I think is an element for the Court

to take into consideration as well as in the case of a jury, and I do not think I am putting too high an estimate on life and limb when I say the value to a man in his position of the thumb of his right hand is \$1,500." *Roylance v. Canadian Pacific R.W. Co.* (1908), 8 W.L.R. 399.

A young woman about twenty-one years old living with her father and earning \$6 a week as stenographer had her left leg amputated at the knee as the result of an accident, paresis in her right hand and arm set in which might be permanent, her back was injured and there was a very serious shock to her nervous system. Evidence was admitted and allowed shewing that her physical injuries impaired her prospects of marriage. Damages for \$5,500 were awarded and upheld: *Morin v. Ottawa Electric R.W. Co.* (1909), p. 113.

A child 5 years and 10 months old was knocked down and run over by a street car and her right leg was in consequence amputated. A verdict for \$8,000 was sustained by the Court of Appeal of Manitoba and by the Supreme Court; Sir Charles Fitzpatrick, C.J., and Davies, J., however, considered the damages "grossly excessive": *Wald v. Winnipeg Electric R.W. Co.*, p. 127; *Winnipeg Electric Ry. Co. ib.* 129.

Where \$4,500 had been allowed by a jury to a widow for the death of her husband a railway engineer, the Supreme Court of Alberta sustained the verdict: *Toll v. Canadian Pacific R.W. Co.* (1908), 8 Can. Ry. Cas. 291, 294.

Where grown-up children sued for damages for the death of their mother, whose own property was insignificant, it was considered that while there might be some expectation of pecuniary benefit within the meaning of Lord Campbell's Act, yet the mere fact that the children were guided and advised by the mother, and sometimes helped by her out of her husband's property did not justify damages to the extent allowed by the jury, and a new trial was ordered: *Ronson v. Canadian Pacific R.W. Co.* (1909), 18 O.L.R. 337.

When a jury had allowed a father \$2,500 for the death of his son fourteen years old the Court of Appeal for Ontario dismissed the action on other grounds, but it was stated that the damages in any case were excessive being "quite beyond what any view of the evidence would fairly warrant": *Hansford v. Grand Trunk R.W. Co.* (1909), 13 O.W.R. 1184.

In *Cray v. Wabash* (1909), 13 O.W.R. 141, \$3,500 damages for the death of a brakeman were considered by the Court of Appeal (Ontario) to be excessive and in *Durant v. Canadian*

Pacific R.W. Co. (1908), 12 O.W.R. 294, 13 O.W.R. 315, \$4,500 damages allowed to a senior brakeman for the loss of an arm below the elbow were by the same Court reduced to \$3,000.

Plaintiff had his leg broken while working in a mine and received other injuries. For these he claimed \$5,000 damages. The jury allowed him damages as follows:—

Expenses	\$325.80
Wages	300.00
Decrease of earning power and permanent injury	2,500.00
Total.....	\$3,152.80

It was shewn at the trial that plaintiff before his accident was suffering from what was probably cancer and that at most he could only live five years and might die much sooner and for part of the time he would be incapacitated. Application was made on the appeal to read an affidavit that plaintiff died six months after the trial from the disease mentioned. This leave was refused but the verdict was set aside because by the broken leg which healed, though it remained bent, his working power as a miner would only be partially reduced and in any case his life must shortly have ended. A new trial was, therefore, granted for the assessment of damages: *Tinsley v. Canada West Coal Co.* (1909, Alberta), 9 O.W.R. 706.

Plaintiff a brakeman lost one arm and one foot and was injured. The jury allowed \$10,000 damages. A new trial was ordered on various grounds and the Judges thought the damages allowed either "excessive" or "large almost to the point of being excessive": *Street v. Canadian Pacific R.W. Co.* (1907, Manitoba), 9 W.L.R. 558.

No damages can be recovered under the Fatal Accidents Act or Lord Campbell's Act, R.S.O. 1897, ch. 166, sec. 1, sub-sec. 2, for the death of an adopted child: *Blayborough v. Brantford Gas Co.* (1909), 18 O.L.R. 243.

The plaintiff recovered judgment for \$300 damages for the death of his son aged four years and three months upon the verdict of a jury. The judgment was affirmed by the Divisional Court and by the Court of Appeal, Moss, C.J.O., and MacLaren, J.A., dissenting, the sole question being whether there could be a recovery of damages, the child being of such tender age, and no special circumstances touching the question of the right of damages appearing or being found by the jury: *McKeown v. Toronto R.W. Co.*, 1 Ontario Weekly Notes 3.

PASSENGER—NEGLIGENCE.

ALBERTA.]

[SUPREME COURT.]

SWAN V. CANADIAN NORTHERN R.W. CO.

(1 *Alta. L.R.* 427.)

Husband and wife—Action of tort for personal injuries to wife—Joinder of parties—Action by husband for loss of his wife's services—Joinder of causes of action—Common Law Procedure Act, 1852, sec. 40—English Order 18, Rule 4—Railway law—Negligence—Combination of circumstances constituting negligence—Access for passengers to cars—Length, lighting and protection of platform—Nature and measure of damages.

Per STUART, J.—Where a married woman sues in tort to recover damages for personal injuries, and not in respect of either her separate, real or personal property, it is not only proper to join the husband as a party plaintiff, but if he is not joined the defendant can insist upon the joinder, either by motion in Chambers or summarily at the trial of the action.

The husband has a right of action in himself alone for the loss of the services of his wife occasioned by such injury. The wife herself has no cause of action arising from such loss, and she cannot be joined as a party plaintiff with the husband in such form of action.

The individual action of the husband for loss of services can be joined with the action of the husband and wife jointly for general damages for the injury suffered by the latter.

Semble, that the Common Law Procedure Act, 1852, sec. 40, is in force in Alberta, and *quære* whether English Order 18, Rule 4, is in force here or not.

Where passengers are impliedly invited by a railway company to make use of a platform as a means of access to the railway cars, it is the duty of the railway company to have the platform in a reasonably safe condition at all points, or parts where such passengers are entitled to be or stand; consequently where the plaintiff sustained injuries by attempting to board a passenger car of the defendant railway company by falling over the unprotected end of the platform, the night being dark and the platform badly lighted, without any carelessness or contributory negligence on her part; *Held*, by STUART, J., that the company were liable for negligence in not having the platform in a reasonably safe condition; and *semble*, that it made no difference whether the platform were well lighted or not.

Circumstances to be considered in estimating damages for personal injuries, etc., discussed.

Per *Ouriam*.—While an act or a circumstance under ordinary conditions may not constitute negligence, under other circumstances or in other conditions it may amount to negligence, or in other words that there may be negligence in the combination.

Held, therefore, that the combination of circumstances in this case, namely, a long night train drawn up at a snort platform inadequately lighted, so that passengers attempting to board the train were not free from danger of accident, constituted actionable negligence on the part of the railway company.

Judgment of STUART, J., affirmed.

THIS action, tried before STUART, J., at Edmonton, on June 19th, 1908, without a jury, was brought by the plaintiff, Alice Swan, and her husband, Charles Swan, claiming (1) on behalf of the husband and wife jointly, damages (including monies paid for medical attendance, hospital fees, etc.), for personal injuries to the wife, alleged to have been caused by the negligence of the defendant: (2) by the husband alone claiming damages for loss of his wife's services as the result of such injuries.

The facts of the case, as found by the learned trial Judge, are as follows:—

The two plaintiffs, with their daughter, had, prior to the 28th October, 1907, been living in the neighbourhood of Lloydminster, while a son was residing in that town not far from the Canadian Northern Railway Station. The plaintiffs had decided to move with their daughter to Vancouver to take up their residence there, and on the date mentioned had come into Lloydminster with the intention of leaving that evening on a train of the defendant company for Edmonton. They stopped at the son's house, and about 9 o'clock in the evening the plaintiff Charles Swan had gone to the ticket office at the defendant's station, and had bought three first-class tickets to Edmonton. He had previously arranged for the shipment of his household goods, and after purchasing the tickets had checked the baggage belonging to the party, except such as they would require to take with them on the train. He had then returned to his son's house to await the arrival of the west-bound train which was due about eleven o'clock. Shortly before that hour the two plaintiffs, the daughter and the son, went to the station, the three former to board the train and the son to assist them. The father and son went ahead carrying some hand baggage, and the mother and daughter walked behind. They reached the platform of the station, which lay on the south side of the railway track, at the west end, and then found that the train had already reached the station. There was a considerable number of people at the station, some intending travellers, and some, no doubt, curious spectators. The party

walked eastward along the station platform, the father and son still in front and the mother and daughter behind. The train consisted of engine and tender, a mail and express car, a baggage car, next a colonist, that is a second-class car, then another colonist car, then a first-class car or day coach, and lastly a Pullman car or sleeper. The train had been so placed that only the first colonist or second-class car stood opposite the platform. The rear steps of this car were, as the evidence clearly shewed, just opposite the eastern end of the station platform. At the eastern end of this platform there were two steps leading down to the ground, so that a person descending regularly would reach the ground with the third downward step. Beyond these steps to the eastward there was nothing but the ground beside the rails, except that a sidewalk some six feet south of the rails ran eastward to a street. The steps, therefore, leading to the first-class car were several feet from the ground, and there was no convenient means of entering that car except by first entering the first colonist car from the station platform and walking back through the train to the first-class car. The night was very dark, and the only lights at the station were an oil lamp at the side of the station building some eighty-seven feet west of the eastern end of the platform, and possibly another further west at the western end of the station building. The plaintiffs, for some reason which they did not clearly explain, instead of entering the train by the forward steps of the first colonist car, went on eastward through the crowd of people to the steps at the rear end of the car. The conductor of the train had, when the train stopped, come forward through the colonist cars instructing the people who desired to alight to come with him to the front of the first colonist car, and he then descended to the platform with a lantern in his hand and assisted the passengers to alight. The reasonable explanation of the action of the plaintiff in going further eastward is that they saw these people alighting and, as travellers often do, thought they could get into the train sooner by going to another entrance instead of waiting for all

the passengers leaving by the front steps to alight. At all events, the plaintiffs, when they reached the rear steps, found passengers leaving the train by that exit and found others also there entering the car. The father and son apparently succeeded in getting somewhat nearer the steps, intending to go in with hand baggage first. The plaintiff Alice Swan and her daughter stood somewhat further back from the steps of the car. It did not clearly appear whether or not the plaintiff Alice Swan was aware that she was standing in the neighbourhood of the eastern steps of the platform. She had been at the station two years before, but had not been there in the meantime, and she clearly had no accurate knowledge of the size of the platform or of the location of the steps. Whether or not she knew these steps were somewhat near her or not, she clearly was not aware exactly how close to them she was standing. A man in the crowd asked her to let him pass as his little girl was ahead. She stepped aside to comply with his request and, in doing so, stepped beyond the edge and fell to the ground and was injured.

The nature and effect of the pleadings, and the questions of law as to joinder of parties and joinder of causes of action, discussed at the trial, with the arguments, are stated in the judgment of the learned trial Judge.

June 19, 1908.

C. F. Newell (*H. C. Lisle* with him), for the plaintiffs.

O. M. Biggar, for the defendants.

June 29, 1908. STUART, J.:—The defendant company pleads, among other defences, that the two plaintiffs are improperly joined as parties because their causes of action are separate and distinct and cannot be joined in one action. After the evidence was taken, counsel for the defendant company urged this latter ground of defence, and referred to *Smurthwaite v. Hannay* (1894), 63 L.J.Q.B. 737, (1894), A.C. 424, 6 R. 299, 71 L.T. 157, 43 W.R. 113, 7 Asp. M.C. 485—H.L. (E.), and other cases. It is

quite apparent, however, that the matter depends upon considerations different altogether from those dealt with in the cases cited. We have no statute in force in this province which gives a married woman the right to sue alone, as if she were a *feme sole*, in respect of a tort committed against her. There is no Territorial Ordinance which touches the subject at all. Chapter 47 of the Revised Ordinances, 1898, refers only to rights and liabilities "in respect of personal property." Sections 36 to 41 of the North-West Territories Act, which by virtue of the Alberta Act, are no doubt still in force in Alberta, notwithstanding the repeal of that Act by the Dominion Parliament at the time of the consolidation of the Dominion Statutes, do not in any way refer to the case of actions by married women in respect of torts committed against them. Our law on the point, therefore, still stands where the English law stood on 15th July, 1870, at which date no statute of any kind had yet been passed dealing with the right of a married woman to sue in her own name.

In the case of *Weldon v. Winslow* (1884), 53 L.J.Q.B. 528, 13 Q.B.D. 784, 51 L.T. 643, 33 W.R. 219 (C.A.), Brett, M.R., explained the old law as follows: "She is suing for personal injury to herself. For such a cause of action no action could ever have been brought by the husband alone without joining his wife as a plaintiff. What is done to her is the cause of action, and under the old practice she might have sued in her own name, without joining her husband, and could have recovered if the defendant did not plead her coverture in abatement, for he could not plead it in bar of the action. The injury to the wife was the meritorious cause of action, and if she had died before the commencement of the action the husband would not have been entitled to sue. If damages should be given they would belong, in the first place, to the wife alone, and if they should not be reduced into possession by the husband and he should die, the damages would be hers, and would not go to his executors. It seems to me that, according to the law of England, the action was always the action of the wife, subject to the right on the part of the defendant of insisting on having the husband joined."

Instead, therefore, of the husband here being improperly joined, the position is exactly the reverse. If the husband had not been joined the defendant could have pleaded in abatement, or rather could, under our present practice, have asked by summons in chambers before the trial or summarily at the trial, and could have insisted, that the husband should be added as a party.

This, however, does not conclude the matter. The husband here claims special damages because he lost the services of his wife. It is clear that his loss of those services give a ground of action to him alone, and that the wife herself has no cause of action arising from such loss. Two things must be clearly distinguished: (1) The wife has a cause of action for the injury to her person for which she may claim general damages, and in such an action the husband must be joined if the defendant demands it. This cause of action is in the husband and wife jointly. (2) The husband alone has a cause of action *per quod servitium amisit*. With this cause of action the wife has nothing to do, and if such an action were alone brought, the wife would be an improper party. In *Dengate and Wife v. Gardiner* (1838), 4 M. & W. 5, 7 L.J. Ex. 201, 2 Jur. 470, the question was briefly referred to. This was an action for slander (where the words were actionable themselves) spoken of the female plaintiff. The declaration stated as special damage that by reason of the words spoken certain persons refused to employ the wife as a servant. At the trial evidence of this special damage was tendered, but Abinger, C.B., rejected it because the action was the joint action of the husband and wife, and a verdict for general damages alone was given. On motion for a new trial, Abinger, C.B., said: "I am not surprised that no case can be found to shew that special damages can be recovered in an action by husband and wife for slander of the wife. She must join because she is the party slandered, and the husband must join for conformity; but as the profit of her wages is entirely his, he alone can sue for the loss of them; just as in trespass by husband and wife for assault on the wife, the surgeon's bill cannot be recovered. The right of action would not survive to her."

It appears, therefore, to be clear that, were it not for the legislation to which I shall presently refer, although the husband in this case would strictly be a necessary party "for conformity," as it is said, yet the claim for special damage by the husband could not be allowed. However, subsequently to the case cited, the Common Law Procedure Act, 1852, altered the law. Section 40 of that Act said: "In any action by a man and his wife for an injury done to the wife in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right and separate actions brought in respect of such claims may be consolidated if the Court or a Judge shall think fit." The scope of this section was considered in the case of *Hemstead and Wife v. The Phoenix Gas Company* (1865), 3 H. & C. 745, 34 L.J. Ex. 108, 11 Jur. (N.S.) 626, 12 L.T. 313, 13 W.R. 662. There the wife had been personally injured by means of a gas explosion, and the husband's house and trade had also been injured. Two actions were commenced, one by the husband for the injury to the house, the second by the husband and wife jointly in which damages were claimed by the wife for the personal injuries, and by the husband because of loss of service. An order was made under the section quoted consolidating the actions, and appeal was taken from this order. The appellant contended that the section was not intended to cover such a cause of action as arose from the injury to the house, but argued that it was confined to damages suffered by the husband by reason of the injury to the wife. The Court held, however, that the order was properly made and that the section covered the wider ground. It follows from this case, as was indeed there admitted by the appellant, that the individual action of the husband for loss of services can certainly be joined with the action of husband and wife jointly for general damages for the injury suffered by the latter. These cases, I think, dispose of the defendant's contention and render it unnecessary to decide whether or not Order 18, Rule 4, of the English Rules which says that "claims by or against husband

and wife may be joined with claims by or against either of them separately," and which is not repeated in our rules, is in force in this province. The rule was, no doubt, substituted on the passing of the Judicature Acts for the section of the Common Law Procedure Act which I have referred to. It might, perhaps, be contended that our rules as to parties are exhaustive, and that even the Common Law Procedure Act cannot be held to be in force with us, but it seems to me that as the relation of husband and wife furnishes a special case not dealt with by our rules at all, and as we have to go back to the law as it stood before July 15th, 1870, to ascertain the position of the wife in any case, at least with respect to her right to sue in tort, we must take the law upon the subject as it then stood as a whole, and this will include the section of the Common Law Procedure Act to which I have referred. Even if it were otherwise, and we were driven back of that statute, the precedent of *Dengate v. Gardiner* (1838), 4 M. & W. 5, 7 L.J. Ex. 201, 2 Jur. 470, would shew that I should merely have to disregard the special claims of the husband for loss of services. But for the reasons given I think it must be also considered and dealt with.

[The learned Judge here set out the facts as found by him as in the preceding statement. The judgment proceeds as follows:]

It is to recover damages for this injury that this action is brought and the question is, is the defendant company liable?

The plaintiff had been sold a ticket and she was entitled to travel by the train. The platform constituted a portion of the premises of the defendant company on which the plaintiff had impliedly been invited to stand as a means of reaching the train. It was therefore clearly the duty of the company to see that the platform was in a reasonably safe condition for the plaintiff to use, and that such condition of reasonable safety should exist at all points or parts of the platform where the plaintiff was entitled, owing to the invitation extended to her, to be. The case should clearly turn upon the simple question whether or not the plaintiff was entitled to stand where she was standing immedi-

ately before the accident. I cannot see that any advantage can accrue to the company by reason of any announcement or instruction that may have been given by the conductor within the train to passengers intending to alight. There is no evidence whatever of any guidance or instruction having been given to passengers waiting on the platform and intending to enter the train. It is clear that a number of intending passengers did pass by the front steps and go on eastward to the rear steps. Nothing was done to warn them against this or to prevent them. These intending passengers, the plaintiffs among them, found passengers alighting by means of the rear steps. The door was open and the steps clear, evidently for that purpose. The plaintiffs found passengers entering and alighting without question. In my opinion the question is not whether this rear door was originally opened by an official of the company or by a stranger, as to which there is no evidence at all one way or the other, but whether, when the plaintiffs in fact saw it open, and, in fact, saw people entering and leaving thereby without any interference or warning by any officer of the company, they were not justified in assuming that what was going on was with the approval of the company and that they were invited to enter the train by those steps and by that door. I think that they were justified in making that assumption in the circumstances, and that the fact that the company permitted that door to be open and those steps to be used in the way the plaintiffs found them open and being used, constituted an invitation to the plaintiffs to enter the car by that way. This being so, the plaintiff Alice Swan was clearly entitled to stand on the platform in the immediate neighbourhood of those steps to await an opportunity to enter. It was, therefore, the duty of the company to see to it that the platform in the neighbourhood of the place where the plaintiff was so entitled to stand, where she had in effect been invited to stand, should be in a reasonably safe condition, and not in a dangerous condition. The fact is that it was in a dangerous condition quite aside from all questions of the darkness of the night and the

amount of light. There can be no question, in my opinion, as to the contributory negligence of the plaintiff. Even had it been broad daylight I think she would have been entitled to assume that while she was standing in a crowd around the car steps waiting to enter upon the invitation extended to her, she would not, by an accidental step sideways, be precipitated over the edge of the platform. The facts of the darkness of the night and the meagreness of the light simply make her case stronger against the defendants and, in my view, relieve her of the remotest possibility of being charged herself with carelessness. Whatever light there was must have been very meagre, and, in my opinion, she could not reasonably be expected to examine carefully by peering through the dim uncertain light into the exact condition of the platform around her feet. She was entitled to assume that it was safe and to act on that assumption. I think that no carelessness whatever can be attributed to her, and, therefore, that the defendant company are clearly liable, and I so hold. See *Foulkes v. Metropolitan, etc., Co.* (1880), 49 L.J.C.P. 361, 5 C.P.D. 157, 42 L.T. 345, 28 W.R. 526 (C.A.).

As to the amount of damages, the evidence is that the plaintiff injured suffered a fracture of the thigh bone; that she was in the hospital for some six weeks, and that after leaving the hospital she was unable to move by herself until April. The attending physician stated that the recovery was satisfactory, considering the injury, but that her leg is now an inch short; that her foot is turned outward, and that she will always be lame, though able to get around with a stick. She is sixty-four years of age, and was, prior to the accident, in ordinary good health for a person of her age. It is very difficult to decide what pecuniary compensation should be allowed to her. A person of her age could not expect, in any case, to be particularly active physically for any great length of time; while on the other hand a fracture of the thigh bone and the consequent shock would certainly be likely to have a more permanent effect upon the physical strength and activity than in the case of a young person with greater recuperative

powers. The evidence, however, does not disclose any general effect of this nature. As far as the evidence goes, the result has simply been a condition of permanent lameness. She must, of course, have suffered considerable pain, and if I can safely judge from her actions and appearance at the trial without a suspicion of make-believe, as to which there is no suggestion, she is still in a weak condition and in need of assistance as she goes about. In our experience in the Courts we have often seen it happen that for the complete loss of a leg a man in early life has been allowed, by six reasonable men, damages ranging perhaps from three thousand dollars—which amount, I observe, was allowed only the other day in Calgary—to perhaps six thousand five hundred dollars, which was recently allowed by a jury at Red Deer. For myself, I have always felt that for such a loss even the higher sum is little enough, but considering the greater age of the present plaintiff and the lesser nature of the injury and its consequences which, as I have said, simply amount to this, that she will be always lame and will need a stick to go about with, I cannot but feel that even the sum of one thousand would be somewhat out of proportion; that is, that it would be just a little too much to allow. I therefore, on the best consideration I can give the matter, have decided to allow the injured plaintiff the sum of eight hundred dollars.

It is not quite clear from the statement of claim which of the plaintiffs is claiming compensation for the hospital and medical expenses, but as the evidence is that these were paid by the husband whose legal duty it was, no doubt, to meet them, I think these should be given to him. They amount in all to \$260.50, which does not appear to be unreasonable. The evidence also shewed that the wife, husband and daughter were detained in a lodging house in Edmonton during the period of the wife's convalescence, that the daughter was obliged to wait upon her as a nurse, and that during this time their living expenses amounted to sixty dollars a month. It is not clear how much, if any, of these expenses should be allowed. Whether they could have lived

during that period more cheaply in Vancouver does not appear, nor was there any evidence to shew whether the husband lost any specific opportunity of employment in Vancouver, or whether, if he had gone there at once, he would have earned any definite amount, or whether, in fact, his presence in Edmonton with his wife was strictly necessary. It seems to me that his loss of employment in Vancouver was presented too vaguely in the evidence to justify me in attempting to base any damages upon it. On the other hand, there can be no doubt that the enforced residence of his wife and daughter in Edmonton for some months at a lodging house must clearly have entailed some pecuniary loss upon the husband. I cannot, of course, give the husband judgment for any damages resulting from the loss of his wife's services in the future, but he has certainly lost her services up to the date of trial. He has also, there can be no doubt, been gravely interrupted in his plans for the future, and I therefore think that, taking everything into consideration, it will be only fair to ask the defendants to pay the full costs of living for the three during the period of convalescence after leaving the hospital, and also something in addition for the husband's loss of the wife's services during that time. Upon the evidence I fix the damages for these two accounts at \$250. Those added to the hospital account would make \$510.50. There will, therefore be judgment for the plaintiff, Alice Swan, for the sum of \$800, and for the plaintiff, Charles Swan, for the sum of \$510.50, with costs of the action.

From this judgment the defendant company appealed. The appeal was heard at the sittings of the Court *en banc* (SIRTON, C.J., SCOTT, HARVEY and BECK, JJ.), at Edmonton, on October 7th, 1908.

O. M. Biggar, for appellant.

The learned trial Judge went on the grounds that it should not be possible for a passenger to fall off a railway platform. This is incorrect. To hold the company liable it must be shewn

that there was negligence in the construction or arrangement of the railway company's property, or in its state of repair, and the evidence must have been due to this fact. A scintilla of evidence is not enough. *Osborne v. London and North Western Railway* (1888), 57 L.J.Q.B. 618, 21 Q.B.D. 220, 59 L.T. 227, 36 W.R. 809, 52 J.P. 806; *Davis v. London, Brighton and South Coast Railway*, 2 F. & F. 588; *Toomey v. London, Brighton and South Coast Railway* (1857), 3 C.B. (N.S.) 146, 27 L.J.C.P. 39, 6 W.R. 44; *Cornman v. Eastern Counties Railway* (1859), 4 H. & N. 781, 29 L.J. Ex. 94, 4 Jur. (N.S.) 657.

The fact that the platform was not as long as the train is not in itself any negligence: *Quebec Central Railway v. Lortie* (1893), 22 S.C.R. 336; *McGiney v. Canadian Pacific Railway Co.*, 7 Man. L.R. 151.

“Actionable negligence is the neglect of the use of ordinary care and skill towards a person to whom the defendant owes a duty of observing ordinary care and skill, by which the plaintiff without contributory negligence has suffered injury”: *Heaven v. Pender* (1883), 11 Q.B.D. 503, 52 L.J.Q.B. 702, 49 L.T. 357, 47 J.P. 709 (C.A.), Brett, M.R., at p. 507.

The construction cannot be said to shew a lack of ordinary care, particularly as Lloydminster was a town recently established, and the railway was a newly-opened one of the colonization sort. The terms “good and sufficient accommodation,” and “adequate and suitable accommodation,” in sections 28 and 258 of the Railway Act, must be held to be relative: *Caster v. Township of Uxbridge* (1876), 39 U.C.R. 113; *Foley v. Township of East Flamborough* (1898), 29 O.R. 139.

C. F. Newell, for the respondents.

Negligence is a question of fact and is always for the jury after the Judge has found that there is some evidence on which negligence might be found. The learned Judge performed the duties of the jury: Taylor on Evidence, 1906 edition, sec. 37a; *Bridges v. North London Railway* (1874), 43 L.J.Q.B. 151, L.R.

7 H.L. 213, 30 L.T. 844, 23 W.R. 62; *Robson v. N. E. Railway Company* (1876), 46 L.J.Q.B. 50, 2 Q.B.D. 85, 35 L.T. 535, 25 W.R. 418 (C.A.); *Rose v. N. E. Railway Company* (1876), 46 L.J. Ex. 374, 2 Ex. D. 248, 35 L.T. 693, 25 W.R. 205 (C.A.); *Doorman v. Jenkins* (1834), 2 A. & E. 256, 4 N. & M. 170, 4 L.J.K.B. 29.

The company was negligent in not properly lighting the platform: *Ferris v. Union Ferry Company*, 36 N.Y. 312; *Hoffman v. New York Central Railway*, 75 N.Y. 605; *Carpenter v. Boston*, 97 N.Y. 494; *Chicago v. Chancellor*, 60 Ill. App. 525.

There was no contributory negligence on the part of the plaintiffs, and the trial Judge has properly so found: Cyc., vol. 29, p. 505; *Guay v. Canadian Northern Railway* (1894), 15 Man. Rep. 275; *Glasscock v. London T. & S. Ry. Company* (1902), 18 T.L.R. 295 (C.A.); *Hall v. McFadden* (1879) 19 N.B.R. 340, 21 N.B.R. 586; *Baker v. Ohio R.R. Co.*, 41 S.E.R. 148.

The husband was properly joined with the wife in the suit: Bullen & Leake's Precedents of Pleading, page 410.

Cur. adv. vult.

October 21, 1908. The judgment of the Court (SIRTON, C.J., SCOTT, HARVEY and BECK, JJ.) was delivered by

HARVEY, J.:—This is an appeal from the judgment of my brother Stuart in favour of the plaintiffs in an action for personal injuries. The only questions to consider are negligence and contributory negligence, for though one of the grounds given in the notice of appeal was the improper joinder of plaintiffs, this ground was not taken before us or raised in the factum.

The facts, as found by the trial Judge, are set out at length in his judgment, and need not be repeated here.

It was argued that no one of the circumstances found to exist constituted negligence, and the defendants, therefore, could not be held liable. The fallacy of this conclusion lies in the fact that while an act or a circumstance under ordinary conditions may not constitute negligence, under other circumstances or in other

conditions it may amount to negligence, or, in other words, that there may be negligence in their combination.

In the present case the defendants drew up their long night train alongside a short platform, stopping one car with the steps of one end nearly opposite one end of the platform. The injured plaintiff attempted to board the train, as she had a right to do, at those steps without a knowledge of the possible danger due to the proximity of the end of the platform. The platform was, as is found by the trial Judge on evidence which justified the finding, not sufficiently lighted to shew the danger. In stepping aside to let some one pass, she went over the edge of the platform and was injured. There was nothing unusual in the circumstances of the occasion which the defendants were not bound to have anticipated. There may have been no negligence in having a short platform or in stopping the train where they did but people properly coming on board the train were entitled to a freedom from danger of accident when such danger could easily have been foreseen and provided against, and apparently if the platform had been adequately lighted this danger could have been avoided.

In my opinion, therefore, the defendants failed to make reasonable provisions for people rightfully coming to their trains as the injured plaintiff was, or, in other words, were guilty of negligence.

I quite agree with the conclusion of the learned trial Judge that the evidence does not justify the conclusion that there was any contributory negligence.

Appeal dismissed with costs.

Emery, Newell & Bolton, solicitors for plaintiffs.

Short, Cross & Biggar, solicitors for defendants.

PASSENGER—NEGLIGENCE—LATENT DEFECT.

ONTARIO.]

[DIVISIONAL COURT.

GAISER V. NIAGARA ST. CATHARINES AND TORONTO R.W. Co.

(19 O.L.R. 31.)

Railway—Carriers of Passengers—Injury to Passenger—Latent Defect in Wheel of Car—Derailment—Negligence—Liability.

The plaintiff brought this action for injury sustained by her owing to the breaking of a flange in the hind wheel of a car of the defendants, on which she was a passenger, on the occasion of an excursion, causing partial derailment and her violent ejection. The flange broke because of an inherent defect in the shape of an airhole at the time of the manufacture of the wheel. The defendants did not shew what tests had been applied by the manufacturers of the wheel, or what could be done to detect the flaw; neither did they shew that they themselves made any proper examination of the wheel before using it:—

Held, that the defendants had failed adequately to discharge their duty of examining thoroughly and skilfully the equipment furnished for the excursion, and were liable.

Judgment of Clute, J., affirmed.

THIS was an appeal by the defendants from the judgment of Clute, J., at the trial of this action, which was for damages sustained by the plaintiff Mary Gaiser by being thrown down an embankment against a signal post by reason of a car of the defendants, on which she was a passenger, leaving the rails and tilting, and for the trouble, expense, and loss of services occasioned to her husband, the plaintiff John Gaiser.

The learned trial Judge, who tried the case without a jury, assessed to Mary Gaiser damages at \$500, and John Gaiser at \$150, and gave judgment in favour of the plaintiffs for those amounts with costs.

This appeal was argued on May 11th, 1909, before BORD, C., and MACMAHON and TEETZEL, JJ.

F. W. Griffiths, for the defendants, contended that the defect in the wheel which caused the accident was a latent defect, which no inspection would have discovered; that the wheel had been inspected on the morning of the accident; and that the defendants were not bound to prove that the wheel was properly manufactured, or to use steel wheels: *Readhead v. Midland R.W. Co.* (1867-69), L.R. 2 Q.B. 412, 4 Q.B. 379, 36 L.J.Q.B. 181, 38 L.J.Q.B. 169;

Stokes v. Eastern Counties R.W. Co. (1860), 2 F. & F. 691; *Canadian Pacific R.W. Co. v. Chailfoux* (1888), 22 S.C.R. 721; *Badgerow v. Grand Trunk R.W. Co.* (1890), 19 O.R. 191; *Ross v. Cross* (1890), 17 A.R. 29; *Ferguson v. Canadian Pacific R.W. Co.* (1908), 12 O.W.R. 943.

W. E. Middleton, K.C., for the plaintiffs, *contra*.

May 15, 1909. The judgment of the Court was delivered by BOYD, C.:—This case is not free from doubt, but, if so, the general rule is that the finding in appeal should not be disturbed. I am inclined to hold that the defendants have not sufficiently discharged the onus, cast upon them by the nature of the accident, to make it manifest that they were not to blame.

The obligation resting upon the carriers of passengers for hire has been expressed in various ways by different Judges, some indicating a greater degree of care than others. As illustrations, I would refer to the language of Lindley, J., in *Hyman v. Nye* (1881), 6 Q.B.D. 685: "It becomes incumbent on (the carrier) to shew that the break down was in the proper sense of the word an accident not preventible by any care or skill:" pp. 687, 688. And, further down on p. 688, he explains thus: "A carriage to be reasonably fit and proper must be as fit and proper as care and skill can make it for use in a reasonable and proper manner . . . The expression 'reasonably fit' denotes something short of absolutely fit; but . . . the difference between the two expressions is not great." Again, in *Francis v. Cockrell* (1870), L.R. 5 Q.B. 501, at p. 513, an earlier case, it is thus put by Montague Smith, J.: "The obligation is that (the carriage) was reasonably fit for the use made of it, so far as the exercise of reasonable care and skill could make it so." The rule is modified in the case of latent defects, but only in so far as they cannot, by reasonable skill or diligence, be discovered by any ordinary and reasonable means of inquiry and examination: *Readhead v. Midland R.W. Co.*, L.R. 2 Q.B. 412, 4 Q.B. 379, as expounded in *Francis v. Cockrell*, L.R. 5 Q.B. at pp. 503 *et seq.*

The learned Judge rightly finds that the accident was attributable to the breaking of a flange in one of the hind wheels of the car,

which caused partial derailment and the violent ejection of the plaintiff Mary Gaiser. The flange broke because of an inherent defect in the shape of an air-hole at the time of the manufacture of the wheel. The flange had been worn down by considerable wear and tear—about half the period of its estimated durability—and I would infer that it had become so thin over the air-hole in the flange that it gave way at the place and time of the accident. The car was heavily loaded, perhaps overloaded, with excursionists, and was proceeding slowly over an easy curve. But the conditions were such that the latent weakness suddenly developed, to the injury of the plaintiff.

Now, the evidence called by the company shews two points wherein I think they fail to comply with what they must prove in order to exonerate themselves. The employes of the company really did nothing in the way of testing the condition of the wheels, excepting casting an eye upon them and being satisfied that they looked all right. Now, this kind of defect cannot be detected by ocular inspection; but the witness Harris (the inspector of the defendants' cars) says that tapping would disclose the blow-hole in a cast-iron wheel if it was close enough to the surface to break through. This was in all probability the condition of the air-hole at the time the car was taken out for this service.

Again, Evans, master mechanic of the International Railroad Co., says that this kind of wheel is so cast as to prevent a blow-hole in the flange, and its presence indicates some defect in the manufacture. The superintendent, Robertson, says he believes the wheels were tested by the manufacturers (the St. Thomas company) when turned out: so he was told, but what was the test he does not know. And Pay, master mechanic of the defendants, says he does not know whether the manufacturers could have found out this blow-hole by testing. And so the matter is left at large and in doubt as to the manner of testing and the effect of testing, by the persons who are responsible for the casting of the wheel.

Now, the law is plain that purchasing from a reputable maker does not absolve the persons who use the article from legal liability for its insufficiency in the carriage of passengers. If the defendants

rely upon the tests applied by the manufacturers when they purchase, well and good; if anything goes wrong, they will then fall back on the manufacturers to give the evidence of what was done or what could be done to detect the flaw. This evidence has not been adduced in the present case, and one of the gaps in the defence has thus not been stopped. The other gap left open is that the defendants themselves made no proper examination of the wheel before putting it in use, after being laid up for the winter and before using it on the first trip in May.

I think the evidence leads to the conclusion that the defendants failed to discharge adequately the duty devolving upon them of examining thoroughly and skilfully the equipment furnished for the excursion, and were negligent in such active diligence as the law demands: *Burrell v. Tuohy*, [1898] 2 I.R. 271.

For this reason, and on this ground alone, I would affirm the decision, with costs.

NOTES.

Evidence of negligence in carrying passengers.

The principles on which this liability depend are fully set out in Canadian Railway Act annotated, pp. 382 et seq. and reference need not again be made to the general principles nor to the cases there collected. A few recent cases have, however, been decided and it may be useful to mention some of them.

The case of *Ryckman v. Hamilton, Grimsby & Beamsville R.W. Co.* (1905), 4 Can. Ry. Cas. 457, decided by the Court of Appeal for Ontario affirms the rule now pretty generally recognized that a head-on collision between two trains on the same line is *prima facie* evidence of negligence. The case went further and laid it down that if in the case of a passenger who is carried gratuitously it is necessary to establish "gross" negligence; such a collision if unexplained is evidence thereof "since it is evidence of the absence of that reasonable care in the particular business of the conduct and management of a railway which the company owes to a person who is received by them for carriage over their line" (*per Osler, J.A.*, p. 460). The decision discusses at length the various cases in

which persons travelling, but not on a ticket paid for by themselves, have brought action for personal injuries. In *Kenny v. Canadian Pacific R.W. Co.* (1902), 4 Can. Ry. Cas. 474, a railway mail clerk employed by the Government and carried free by the defendants was injured by the train on which he was travelling falling through a bridge. The same cases as those in the *Ryckman* decision were discussed from a somewhat different standpoint and McGuire, C.J., says, at page 479, "I think the result of the cases is that every person on the railroad in the care of the carrier is a passenger although no fare has been paid." Though this remark might apply to the class of cases to which the learned Judge was referring it is submitted that it might be given a broader interpretation than the cases have decided. In the *Ryckman* case already mentioned Mr. Justice Osler, at page 465, draws a distinction between a person "travelling as an accepted passenger on a pass" and "a mere licensee." See also such cases as *Nightingale v. Union Colliery Co.*, 4 Can. Ry. Cas. 197, and *Central Vermont R.W. Co. v. Franchère*, 35 S.C.R. 68, where this distinction is referred to by the Supreme Court. In the case of an employee properly on the train in the course of his duty, no question of payment of fare could arise and so in *Quebec, &c. R.W. Co. v. Julien* (1906), Q.R. 14 K.B. 482; 37 S.C.R. 632, 6 Can. Ry. Cas. 54, the widow of an engine driver killed on one of the company's freight trains was entitled to recover and the principles laid down as applicable to passengers on passenger trains in Ontario in *Great Western R.W. Co. v. Braid*, 1 Moo. P.C. (N.S.) 101, were applied to the case of an employee killed while upon a freight train in Quebec. In that case the accident happened owing to a defect in the construction of the railway which might have been averted by greater foresight or care and it was laid down "that in constructing the road bed without sufficient examination, upon treacherous soil and failing to maintain it in a safe and proper condition, the railway was *primâ facie* guilty of negligence which cast upon them the onus of shewing that the accident was due to some undiscoverable cause"; that this onus was not discharged by the evidence adduced from which inferences merely could be drawn and which failed to negative the possibility of the accident having been occasioned by other causes which might have been foreseen and guarded against. Where a passenger was injured owing to the unusual and sudden stoppage of a train at a station it was held that such stoppage was in itself *primâ facie* evidence

of negligence, that it was not rebutted simply by shewing that it was rendered necessary to save the life of a person who had attempted to cross in front of the train but that the company must go further and shew that the cause which led to the necessity of stopping the train was not brought about by any negligence on their part: *Angus v. London, Tilbury & South End R.W. Co.* (1906), 22 Times L.R. 222.

STREET RAILWAY—FRANCHISE—VALUATION.

ONTARIO.]

[COURT OF APPEAL.

BERLIN AND WATERLOO STREET R.W. CO. v. TOWN
OF BERLIN.

(19 O.L.R. 57.)

Street Railway—Assumption of Ownership by Municipality—Award of Arbitrators—Principle of Valuation—Allowance for Value of Franchise—Allowance for Compulsory Taking—Street Railway Act, sec. 41.

Arbitrators were appointed under the Street Railway Act, R.S.O. 1897, ch. 208, to determine the value of the appellants' railway and all real and personal property in connection with the working thereof, the ownership of which had been assumed, under the provisions of sec. 41 (1) of the Act,* by a town corporation, part of the railway being laid within the town. The arbitrators in their award fixed on a certain sum as "the actual present value of the railway and of the real and personal property in connection with the working thereof," and stated that in arriving at that value they had "valued the railway as being a railway in use and capable of being used and operated as a street railway," and that they had "not allowed anything for the value of any privilege or franchise whatsoever," in either of the municipalities in which the railway was laid. They further stated that they had not been able to assent to the contention of the company that the proper mode of valuation should be to capitalize the amount of the permanent net earning power of the railway, and that they had not reached their valuation in any way on that basis, but had "considered only the actual present value:"—

* R. S. O. 1897, ch. 208, sec. 41.—(1) No municipal council shall grant to a street railway company any privilege under this Act for a longer period than twenty years, but at the expiration of twenty years from the time of passing the first by-law which is acted upon, conferring the right of laying rails upon any street, or at such earlier date as may be fixed by agreement, the municipal corporation may, after giving six months' notice prior to the expiration of the period limited, assume the ownership of the railway, and all real and personal property in connection with the working thereof, on payment of the value thereof, to be determined by arbitration.

Held, Moss, C.J.O., dissenting, that the arbitrators had erred in their method of valuation, and that in the case of a railway producing, as the appellants' railway did, a considerable permanent profit, the proper method of valuation was to take its net permanent revenue and capitalize that, the result representing its real value.

Stockton and Middlesbrough Water Board v. Kirkleatham Local Board, [1893] A. C. 444, distinguished.

Right of owner to allowance of 10 per cent. as for compulsory taking discussed.

Judgment of BRITTON, J., reversed, and award remitted to the arbitrators for reconsideration.

THIS was an appeal by the company from the judgment of BRITTON, J., dismissing their appeal from the award of arbitrators appointed to determine the value of their railway and of all the real and personal property in connection with the working thereof, under sec. 41 of the Street Railway Act, R.S.O. 1897, ch. 208.

The arbitrators made their award on the 29th December, 1906, fixing the value of the railway and the said real and personal property at the sum of \$75,200.

The portion of the award which is material in respect of the appeal is as follows:—

“In arriving at the above value, we have valued the railway as being a railway in use and capable of being used and operated as a street railway, and have not allowed anything for the value of any privilege or franchise whatsoever, either in the town of Berlin or in the town of Waterloo.

“It was argued before us, on behalf of the street railway company, that the mode and principle of valuation should be to ascertain the amount of the present net earning power of the railway and to capitalize this amount, so as to reach the correct value of the railway and the real and personal property in connection therewith. We have not been able to assent to that contention, and have not reached our valuation as above in any way on that basis, but have considered only the actual present value.

“It was argued, on behalf of the Berlin and Waterloo Street R.W. Co., that if our valuation was upon actual present value, we should add to the amount found by us as such present value ten per cent. of that value as for compulsory taking. We have not been able to accede to this contention, and have not added anything on that account.”

From this award the company appealed, and the appeal was argued before BRITTON, J., in Weekly Court, on the 13th February, 1907.

H. J. Scott, K.C., for the appellants.

H. L. Drayton and *J. A. Scellen*, for the respondents.

March 8, 1907. BRITTON, J.:—This is an appeal by the Berlin and Waterloo Street R.W. Co. from an award of three arbitrators, dated the 29th December, 1906, awarding to the railway company \$75,200 for their railway and property.

The application is to set aside the award, or to increase the amount, or to revoke the submission, or for some order by way of relief, upon grounds stated in the notice of motion. Some of the questions raised have already been determined.

Upon a special case stated by the arbitrators for the opinion of the Court, MacMahon, J., decided that sec. 65 of 6 Edw. VII. ch. 31 prevents the repeal of ch. 208, R.S.O. 1897, as affecting the present reference, and, further, that the parties are bound by the agreement between them dated 21st June, 1906. See *Re Town of Berlin and Berlin and Waterloo Street R.W. Co.* (1906), 8 O.W.R. 284.

That decision is binding upon me. Upon the argument nothing was abandoned, and every objection was formally presented.

The main question presented, as I regard it, was that the appellants were entitled, as part of the value of their railway and as part of the property used in connection therewith, to the franchises, operating agreements, and other contract privileges and benefits incidental thereto.

It was conceded upon the argument that the appellants cannot succeed unless this case is distinguished on principle, or by reason of the difference in the Acts which govern, from *Stockton and Middlesbrough Water Board v. Kirkleatham Local Board*, [1893] A.C. 444 (House of Lords).

In the *Stockton* case the special Act provided that when so required by the sanitary authority of any such outlying district

the board should sell to such sanitary authority the mains, pipes, and fittings belonging to the board within that district "at a price to be fixed, in default of agreement, by an arbitrator"; and after such sale the board should cease to supply water within the district. It was held that upon the true construction of the special Act, the word "price" meant price, and not compensation; and that in fixing the price the basis of calculation should be merely the value of the mains, pipes, and fittings regarded as plant *in situ* capable of earning a profit, and that the arbitrator must not include, in fixing compensation to the board, anything for the loss of the right to supply water within the outlying district.

It was argued that in the *Stockton* case the question was one of sale and purchase, and that by sec. 41 of ch. 208, R.S.O. 1897, there is no right given to the municipality to buy, and no obligation on the part of the railway company to sell; but it is here an assuming "the ownership of the railway, and all real and personal property in connection with the working thereof, on payment of the value thereof, to be determined by arbitration."

If there is any distinction between purchasing and assuming the ownership of any property, I do not think it assists in determining the question of what the municipality, upon purchasing, or upon assuming the ownership, is to pay for. The municipality is to pay the value of the railway and all real and personal property in connection with the working of it. How is this value to be ascertained?

The transaction is practically one of purchase. Section 42 of the Act (ch. 208, R.S.O. 1897), dealing with the case of where a company's line or lines is or are situated in two or more municipalities—and that is the present case—gives to the municipality in which is the greater mileage "the right to exercise the power of purchase herein conferred," and declares that "the corporation purchasing shall thereafter possess all the powers and authority theretofore enjoyed by the company." Again, sec. 45 speaks of the municipal corporation purchasing, and gives power to "transfer its rights to its railway lines or any of them, and the whole or any part of the plant of the railway, to any railway com-

pany authorized to operate a railway," subject again to the provisions of sec. 41 as to such railway being assumed by a municipal corporation entitled under that section.

Before the arbitrators Mr. Kappeler contended that it was a sale of the railway—a sale of it as a going concern.

In *Re City of Kingston and Kingston Light Heat and Power Co.* (1902-3), 3 O.L.R. 637, 5 O.L.R. 348, affirmed by the Privy Council on the 20th April, 1904, the words "all the works, plant, appliances, and property of the company used for light, heat, and power purposes, both gas and electric," were held not to include anything "for the value of the earning power or franchise of the company."

In *Edinburgh Street Tramways Co. v. Lord Provost, etc., of Edinburgh*, [1894] A.C. 456, the decision was really upon the following words, "shall sell to them their undertaking, or so much of the same as is within such district, upon terms of paying the then value . . . of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district." As I read that case, the decision would have been the same if the words in brackets in the Act, which I have left out, were not there at all.

It was held that the word "tramway" was used in the Act as meaning the structure laid down on the highway, and nothing more; therefore the value of the tramway must be measured by what it would cost, at the date of the sale, to construct the lines, subject to a deduction for "depreciation, and that rental value must not be taken into consideration."

The elaborate judgments in that case cover the whole ground, but I do not need to make further citations therefrom. On principle I am unable to distinguish it from the present case. The arbitrators were right in valuing "the railway as being a railway in use, and capable of being used and operated as a street railway." In that sense the railway was considered as a "going concern," but, apart from that, nothing was allowed for the value of any privilege or franchise in Berlin or Waterloo. The arbi-

trators declined to adopt as the principle of valuation the capitalization of the net earning power of the railway.

In my opinion, the arbitrators were right in doing as last mentioned, and they were also right in refusing to add ten per cent. to the value found. There is no authority, either under the statute applicable in this case, or under the agreement between the municipality and the company, to make such addition.

As to amount, the arbitrators appear to have gone very fully and carefully into the matter. The evidence is very voluminous, and there is not as to any particular item or items anything upon which I can disturb the findings.

The appellants object that the time within which the municipal corporation of the town of Berlin were to assume the ownership of the property intended to be affected by the award had expired before the publication of the said award.

The appellants are not in a position to urge this objection on the present application—if at all. They proceeded with arbitration proceedings down to the making of the award. I must deal with the objections as objections to an award made in due course and as authorized by the Act.

The appellants are not, in my opinion, entitled to succeed.
Motion dismissed with costs.

From this judgment the company, by special leave, appealed directly to the Court of Appeal, and the appeal was heard on the 18th and 19th May, 1908, by MOSS, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A.

James Bicknell, K.C., and *W. D. McPherson*, K.C., for the appellants. The Court is asked to vary the award or to determine the principles on which it should be made. The agreement for arbitration is set out in the statute 7 Edw. VII. ch. 58, which gave the town power to take possession of the road, and which was practically a Confiscation Act. Nothing has been allowed by the arbitrators for the rights of the company in Waterloo, where they had what was practically a perpetual franchise. The method of valuation adopted by the arbitrators was erroneous.

The entire undertaking was to be taken over—a fact which distinguishes this case from the English and Scotch cases which were relied on in the Court below. The case of *Toronto Street R.W. Co. v. City of Toronto*, [1893] A.C. 511, relied on by the respondents, is distinguishable, it being a case of contract, while here it is a question of a right given by statute. The English and Scotch cases relied on and cited by the respondents in their reasons against appeal (*Stockton and Middlesbrough Water Board v. Kirkleatham Local Board*, [1893] A.C. 444, *London Street Tramways Co. v. London County Council*, [1894] 2 Q.B. 189, [1894] A.C. 489, *Edinburgh Street Tramways Co. v. Lord Provost, etc., of Edinburgh*, [1894] A.C. 456), are also clearly distinguishable, as they all turn upon the strict construction of the language used in the statutes which govern them, and here the language is different. A careful examination of the last two of these cases shews that the decisions turned to a large extent on the point that the arbitrators were by the express terms of the statutes forbidden to make any allowance for “the past or future profits of the undertaking,” words which are not referred to in the judgment appealed from, but which had a most important bearing upon these decisions. The *Kirkleatham* case, on which so much stress is laid in the judgment of Britton, J., is referred to by Henn Collins, J. (cited by Lord Ashbourne in [1894] A.C. at p. 483), as shewing “the words which the Legislature uses when it does intend that the thing sold and the thing paid for shall be the materials, and not the right to use the materials.” Here the respondents get the entire undertaking and rights of the company, so the case cited has no application. The construction asked for by the town is unjust to the company, which, after passing through a number of “lean years,” will, if this judgment is affirmed, be deprived of a great part of the fruits of their enterprise. The town has taken all that we have and should pay for it. The arbitrators do not deal with the railway as a thing “in use” when they simply ascertain and add up the value of the rails, spikes, etc., of which it is composed. No allowance has been made for expenses in connection with the appellants’ services in superintending the

construction, nor for interest on moneys invested, and for these reasons the award should be remitted to the arbitrators for reconsideration.

H. L. Drayton, K.C., and J. A. Scellen, for the respondents. Under the Consolidated Municipal Act of 1903, sec. 569, the municipality has the powers of a street railway corporation, and is also entitled to go into other municipalities. The powers of English municipalities are not so great. The respondents rely upon the *Toronto Street Railway* case already cited, and refer to the judgment of Robertson, J., in that case, *Re Toronto Street R.W. Co.* (1892), 22 O.R. 374, at p. 384, and to the judgment of MacLennan, J. A., in the same case on appeal, *In re City of Toronto and Toronto Street R.W. Co.* (1893), 20 A.R. 125, 138, especially at p. 139, where it is held that the word "railway" does not necessarily mean the "undertaking" of the company. The principles laid down in these judgments were confirmed by the Privy Council and are on all fours with those which govern the present case. Reference is also made to *Re City of Kingston and Kingston Light Heat and Power Co.*, 5 O.L.R. 348, and also to the judgment of Lindley, L.J., in the *Kirkleatham* case, reported in [1893] 1 Q.B. 375, at p. 384. If the revenue of the company is capitalized as suggested by the appellants, it would be giving them, in effect, a perpetual franchise, to which the cases clearly shew they are not entitled. As to the claim made for expenses and interest, these points are answered in the reasons against appeal, and the arbitrators may report, if they have allowed for these items, as to the principle involved in which there was no issue between the parties, but simply as to the amount.

McPherson, in reply.

December 31, 1908. GARROW, J.A.:—This is an appeal by the street railway company from the judgment of Britton, J., dismissing an appeal from the award of a board of arbitrators appointed by the parties to value the street railway upon its assumption by the corporation of the town of Berlin.

Several matters were argued before us by the learned counsel for the appellants, but, as the reference and the award were both

confirmed by statute (see 7 Edw. VII. ch. 58 (O.)), it is quite beyond question, I think, that the only matter open is the one reserved by the last section (6) of that statute, namely, the amount, which it is there said may be varied on appeal. And the contest is not so much as to the allowance or disallowance of particular items, except in one or two instances, as to the principle upon which the arbitrators proceeded.

The language of the statute, R.S.O. 1897, ch. 208, sec. 41 (1), is as follows: “. . . the municipal corporation may, after giving six months' notice prior to the expiration of the period limited, assume the ownership of the railway, and all real and personal property in connection with the working thereof, on payment of the value thereof to be determined by arbitration.” The arbitrators determined that the sum of \$75,200 “is the actual present value,” and in the award they say that they declined to accede to the contention of the company that the proper mode to proceed was to ascertain the present net earnings and to capitalize that amount. They also say that in arriving at that value they valued the railway as “a railway in use and capable of being used and operated as a street railway,” but did not allow anything for the value of any privilege or franchise whatsoever, either in the town of Berlin or in the town of Waterloo.

These abstracts from the award sufficiently indicate the appellants' contentions upon the question of value, the same arguments having apparently been addressed to the arbitrators as were afterwards addressed to us.

Britton, J., agreed with the arbitrators, and dismissed the appeal, largely upon the authority of the case in the House of Lords of *Stockton and Middlesbrough Water Board v. Kirkleatham Local Board*, [1893] A.C. 444, which, in his opinion, could not be distinguished. There a water board was constituted by a special Act with the right of supplying water within the boundaries of two boroughs and certain districts beyond these boroughs, “provided that when so required by the sanitary authority of any such outlying district the board should sell to such sanitary authority the mains, pipes, and fittings belonging to the board

within that district at a price to be fixed, in default of agreement, by an arbitrator; and, after such sale, the board should cease to supply water within such district." And it was held that the word "price" did not mean "compensation," and that, in fixing the price, the basis of calculation should be merely the value of the mains, pipes, and fittings regarded as plant *in situ* capable of earning a profit, and that the arbitrators could not, in addition, allow compensation for the loss of the right to supply water within the outlying district. There the arbitrator stated that his mode of procedure was to take the cost of the mains, pipes, and fittings, of laying them down, and making good the ground, and to deduct a sum for depreciation. And, while in that case this was held to have been proper, Lord Herschell, L.C., at p. 449, says that it might not be proper in all cases, and instances a case, not unlike the present, where there had been from time to time an expenditure in perfecting the system and bringing in no immediate return. And as applicable to such a condition, he says: "It is obvious that any one who found that whole system complete and ready for working would be prepared to give more for it than the aggregate sums which had been spent in constructing it, inasmuch as he would have it then ready, and as soon as he had paid his money for it he would be in a position almost immediately to begin earning a profit, at all events, much more quickly than if he had occupied a great deal of time in its construction."

In addition to these qualifying remarks, there are also other material differences. What is taken in the present case is the whole system or railway, all ready to use and capable at once of earning, and earning a profit; there only the "mains, pipes, and fittings" in the outlying district were to be acquired, and these could only be made available by being afterwards connected with some other system of supply. There what was to be paid was the "price" of these definite articles, neither more nor less; here the corporation could only assume the ownership of the railway on paying the "value" thereof. "Value" and "price" may occasionally mean the same thing, but not necessarily so. These considerations lead me, with deference, to the conclusion

that, whatever may be the proper result of this appeal, the authority upon which Britton, J., so much relied is not in the way of reconsidering the award.

In the English Tramways Act, 1870, the corresponding provision is expressed as "the then value (exclusive of any allowance for past or future profits of the undertaking or any compensation for compulsory sale or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters, suitable to and used by them for the purposes of their undertaking within such district." And a similar provision is contained in the London Street Tramways Act, passed at the same session.

Under these Acts there have been two decisions in the House of Lords, namely, *Edinburgh Street Tramways Co. v. Lord Provost, etc., of Edinburgh*, [1894] A.C. 456, and *London Street Tramways Co. v. London County Council*, in the same volume, at p. 489, which, while the language of the statutes there in question is still not identical with that of our statute, seem to me to be more in point than the case relied on by Britton, J. The "then" value is not different, I think, from the "value," which must refer to the period at which the railway is assumed by the municipality. And the term "tramway" may well be regarded as the equivalent of "railway" in our Act. The main difference is in the use of the words contained in the parenthesis. The decision was, Lord Ashbourne dissenting, that the word "tramway" meant the structure laid down and nothing more, and did not include the statutory powers conferred on the company; that the arbitrator was right in rejecting all evidence of past and future profits, and in awarding that the "then value" of the tramway and all lands, buildings, works, etc., must be measured by what it would cost to establish a tramway if it did not exist, subject to a proper deduction in respect of depreciation.

But it is impossible to read the judgments without seeing that much stress was laid upon the words in parenthesis, and that if they had not been there, the judgment of the Divisional Court setting aside the award and remitting the matter to the arbitrator

might not have been disturbed. The opinion of the Divisional Court, in very carefully considered and, to my mind, well-reasoned judgments, was that, notwithstanding the parenthetical words, the "value" was to be ascertained upon a profit-producing basis, and not merely upon the actual value of the material *in situ*. No two statutes, much less two conditions of fact, are usually identical, and all the circumstances must in each case be considered in order to arrive at what the Legislature intended.

Not much guidance is contained in the bald word "value" used in the section which I have set out, and yet there is always this, that justice, not confiscation, is to be presumed in such a case. Under the provisions of secs. 42, 43, 44, 45, the municipality may operate the railway, or may transfer it to a new or other company. And, of course, the municipality might have granted the franchise for a second term of twenty years to the present company upon terms to be agreed upon.

The statute plainly contemplates the continuous operation of the railway by one mode or the other, with periodical renewals of the franchise, when new terms may be agreed upon, or the railway may be taken over by the municipality. What, then, is the "value" intended by the statute? The question is certainly not without its difficulties. The English decisions, depending on statutory provisions not identical, while they help, do not determine the question. There are, it appears to me, but the two courses: one, to value the material of the railway, including, of course, its lands; the other, to take its net permanent revenue and capitalize that, the result representing its real value. If a railway was being operated at a loss or without profit, the first would be apparently the proper course, because it would have no value beyond the value of its parts, but if it does produce, as this railway does, a very considerable profit, and if it appears that such profit has the quality of permanency, then the other method appears to me to be the only one which could do justice to both parties. The company gets the fruit of its enterprise and its long years of waiting, and the municipality gets the railway, and at once receives the profits—in other words, it gets value

as well as gives. It was not, I am sure, intended that the municipality should gain, at the end of the twenty years, at the expense of the company. The municipality parted with the franchise for nothing for the first period of twenty years, and, taking one year with another, it was really worth nothing during that period. Now it has become valuable because of the enterprise and success of the company. But each has had, or is entitled to have, simply what was bargained for. So that no question of franchise, either in Berlin or in Waterloo, during that period has, in my opinion, anything to do with the valuation, either by way of increase or deduction. If a new bargain was being made, as might, but for the action of the municipality, have been the case, a price could have been put upon the franchise for the next period, but, on the other hand, if agreed to, the company would in that case receive the benefit of all future increases in profits, and the one would probably balance the other.

The net annual sum which is to be capitalized should, of course, be arrived at with care. It is not necessarily the net income of the last year, although the "value" is to be that at the end of the twenty years. Everything abnormal should be eliminated. With this view the previous years—as many of them as may be necessary—should be carefully examined to see that any gain is likely to be permanent. It should, of course, also be ascertained that the plant is in such condition that, by a normal expenditure upon repairs and replacements, the net annual profit for the year selected for capitalization may reasonably be expected to be capable of being maintained, and due allowance made if the reverse is found to be the fact.

All these elements at least, and perhaps others, enter into the question of what is the real net annual value of the railway, but when that is ascertained, the rest seems to be mere matter of calculation.

I think the award should be set aside and the matter remitted to the arbitrators for reconsideration, and that the costs of the appeal should be paid by the respondents.

OSLER and MACLAREN, JJ.A., concurred in the judgment of GARROW, J.A.

Moss, C.J.O.:—Appeal by the railway company from a judgment of Britton, J., affirming an award of arbitrators appointed to determine the value of the railway owned by the Berlin and Waterloo Street R.W. Co. and of all the real and personal property in connection with the working thereof.

The arbitrators, by their award, found the actual present value of the railway and the real and personal property in connection with the working thereof to be the sum of \$75,200. They stated in their award that, in arriving at the above value, they valued the railway as being a railway in use and capable of being used and operated as a street railway, and did not allow anything for the value of any privilege or franchise whatsoever either in the town of Berlin or in the town of Waterloo.

They also stated that it was contended before them, on behalf of the street railway company, that the mode and principle of valuation should be to ascertain the amount of the present net earning power of the railway and to capitalize this amount, so as to reach the correct value of the railway and the real and personal property in connection therewith, but they had not assented to that contention, and had not reached their valuation in any way on that basis, but had considered only the actual present value.

They further stated that it was contended, on behalf of the street railway company, that if their valuation was on actual present value, they should add to the amount found by them as such present value ten per cent. as for compulsory taking, but they had not acceded to this contention.

Upon motion on behalf of the street railway company, by way of appeal from or to set aside the award, Britton, J., upheld it, and determined that, in ascertaining the value, the arbitrators proceeded upon proper principles. Pending an appeal to this Court, an Act was passed by the Legislature and assented to on the 20th April, 1907 (7 Edw. VII. ch. 58), by which it was

enacted, amongst other things, that the agreement of reference and the award were ratified and confirmed, subject to such variation in the amount of the award as might be made on appeal.

The preamble of the Act and the schedules thereto set forth or refer to the steps by which the parties arrived at the point of an arbitration and the award in question, and it is not necessary to repeat them here.

The Act also contains provisions wholly incompatible with the notion that the railway company is now, or was at the time of the arbitration and award entitled, to a continuance of the privilege of working its railway in either of the towns of Berlin or Waterloo for a further period of five years from the expiration of the periods of twenty years granted by these municipalities.

The Act must be regarded as having put an end to the right—if it ever existed in this case—allowed, under certain circumstances, to street railway companies by sub-sec. (2) of sec. 41 of the Act respecting Street Railways, R.S.O. 1897, ch. 208. Having regard to the special Act, the matter must be treated as one arising under sec. 41 (1) of the R.S.O. ch. 208.

The only question, therefore, that is now open on appeal is whether the principles which the arbitrators adopted in ascertaining the value of the railway and the real and personal property in connection with the working thereof were those proper to be applied. There are a few subsidiary questions, but they do not affect the main question, though their determination affects to some extent the amount of the award.

Section 41 of the revised statute provides that “. . . the municipal corporation may, after giving six months' notice prior to the expiration of the period limited, assume the ownership of the railway, and all real and personal property in connection with the working thereof, on payment of the value thereof, to be determined by arbitration.” And that is the situation in this case. The prescribed notice was duly given, the parties proceeded to an arbitration, an award was made, and the special Act has authorized the town of Berlin, upon payment of

the amount of the award, to take over and enter into possession of the street railway and all property and effects thereof (with certain trifling exceptions), as set out in the award.

The basis upon which the arbitration proceeded—indeed, it was the only basis on which it could proceed—was that the privileges of the street railway company of working its railway within the two municipalities terminated upon the expiry of the twenty years during which the privileges existed under the respective agreements with the municipalities, and that the town of Berlin was entitled to assume the ownership of the railway and the real and personal property connected with the working thereof, shorn of all privileges rendering it a going concern in the hands of the railway company.

This fundamental fact has a most important bearing on the question of value and largely governs the method of its ascertainment.

To a great extent, it disposes of the contention that, in ascertaining the value, allowance should be made for past or future profits or that the element of profits should be taken into consideration.

It is also important to bear in mind that, so far as the evidence discloses, the town of Berlin is not assuming the ownership of the railway as a commercial venture, with a view to letting or selling it to a company to operate, but in order to carry it on as a municipal undertaking, and that the powers of the town to so carry it on are not derived from the railway company, but from the Municipal Act, the present enactment being sec. 569 (2) *et seq.* of the Act of 1903. So that, when the town assumes the ownership of the railway, the railway company gives nothing in the way of powers or rights of maintaining or operating the railway in or upon the streets of the town.

It follows that the railway company, not having any rights of the character above mentioned of which they can dispose, are not to be treated as giving up to the town a going concern, in the sense that it is one capable of earning profits in the company's hands. That of which the town assumes the ownership, and

which the railway company are able to give to it, appears to be aptly described by the arbitrators in their award as a railway in use, and capable of being used and operated, as a street railway, but without any privilege or franchise enabling them to operate it either in the town of Berlin or the town of Waterloo.

The compensation is to be assessed with reference to the value of the railway company's interest, and not with reference to the value to the town: *Stebbing v. Metropolitan Board of Works* (1870), L.R. 6 Q.B. 37.

It is said that to value the railway and the real and personal property in connection with the working thereof on this basis works a great hardship on the railway company and its shareholders, who by expending and risking their capital have established a profit-earning concern.

But if that is the effect of the legislation, it must be accepted, and it may be said of the railway company, as it was said by Lord Adam of the "promoters" in the case of *Edinburgh Street Tramways Co. v. Magistrates of Edinburgh* (1894), 21 Court Sess. Cas., 4th series (Rettie), 688, at p. 698, that "they knew when they entered on their undertaking that it was in the power of the defenders, the local authority, to terminate by notice their exclusive use at the end of the time. . . . The local authority were themselves the owners of the streets on which the tramway lines lay, and I can quite understand that the Legislature considered that when they became owners of the tramways they should not be called upon to pay for the right of using the streets, which were their own property, in this particular way, for the benefit of the inhabitants, and that it was sufficient that the pursuers should be paid for the material subjects which had cost them money, but that they should not be paid for these powers which had cost them nothing."

The decisions under the English Tramways Act, 1870, and the London Tramways Act must, of course, be considered with reference to the language used by Parliament, but an examination of the speeches of the Law Lords who formed the majority in the cases of *Edinburgh Street Tramways Co. v. Lord Provost*,

etc., of Edinburgh and London Street Tramways Co. v. London County Council, [1894] A.C. 456 and 489, tends to shew that the decisions turned not so much upon the significance of the parenthetical words in sec. 43 of the Tramways Act, 1870, as upon the fact that the value of the thing purchased and sold was not of the "undertaking," which was not defined in the Act, but of the tramway and all lands, buildings, works, materials, and plant, etc., and that such value was to be ascertained in view of the further fact that the property was devoid of any privilege or franchise enabling it to be further operated by the tramway companies. Lord Herschell, L.C., said (p. 465): "It was contended for the appellants that the presence of the parenthesis indicated that, in the opinion of the Legislature the term 'value of the tramway' would, but for the words in the parenthesis, have justified an allowance for past or future profits of the undertaking, and must therefore include something more than the value of the structure. I cannot assent to this argument. The words of the parenthesis may well have been enacted by way of precaution, to make sure that countenance was not given to any contention which would have involved fixing a sum in excess of the value of the structure."

There were difficulties in the construction of the Tramways Act, 1870, owing to the use of language which does not occur in R.S.O.1897, ch. 208. Here the town is to assume the ownership of the railway, etc., on payment of the value thereof. And the conditions under which it is held are the same in effect as those under which the tramways were held in the cases cited.

The principles which the arbitrators adopted in this case seem to be the proper ones under the circumstances.

Objection was further made that the arbitrators made no allowance for services in supervising the construction of the railway nor for interest on moneys invested during the construction and pending the completion of the undertaking. From affidavits made by two of the arbitrators and a certificate from the other member of the board produced since the argument it appears that these items were considered and an allowance made

in respect of them, but not of the full amount claimed by the railway company.

The arbitrators were the best judges of the fairness and adequacy of the allowances made, and there is no good ground for interfering with their conclusion.

Objection was also made to the refusal of the arbitrators to allow 10 per cent. of the value of the railway, etc., as found by them, as for compulsory taking.

In Boyle and Waghorn's Law and Practice of Compensation, speaking of the right of an owner to full compensation in the case of compulsory taking, it is said (p. 424): "He is also entitled by custom to ten per cent. for compulsory sale, which should be added to the value of the premises taken, but not to any compensation due to him for injury to his trade." No cases are referred to, but it seems to be beyond doubt that the allowance is recognized. Indeed, the reference in the parenthesis in sec. 43 of the Tramways Act, 1870, to any allowance as compensation for compulsory sale bespeaks the prevalence of the custom in the case of a compulsory taking. And it has not been considered unreasonable to make an allowance of the same nature in this Province in cases where there has been compulsory taking of lands in the exercise by municipal corporations, railway companies, and other corporations of powers of expropriation.

But the rule or custom is only applicable to cases of that character. The allowance may be treated as in the nature of a *solatium* to an owner who is deprived against his will of the proprietorship of his land and of the right to hold and enjoy it at his pleasure and to sell or not, as he sees fit.

But the present case is not one of that character. It is in the nature of a bargain, with a price to be ascertained in a certain defined manner. It is equivalent to an agreement to sell at a price to be fixed, and in that sense does not involve the elements of a compulsory taking.

The appeal should be dismissed with costs.

NOTE.—An appeal has been taken to the Supreme Court, where it is now standing for argument.

ARBITRATION—COMPENSATION—INTEREST.

ONTARIO.]

[MEREDITH, C.J.C.P.]

IN RE CLARKE AND TORONTO GREY AND BRUCE R.W. Co.

(18 O.L.R. 623.)

Railway—Compensation Awarded for Lands Taken—Interest—Jurisdiction of Arbitrators—Possession Taken by Company under Warrants of Possession—Payment of Money into Court—Payment out—Rate of Interest.

The power conferred on arbitrators appointed under the Railway Act, R.S.C. 1906, ch. 37, to award compensation for lands taken by a railway company is limited to determining the amount of such compensation merely; and, therefore, they exceeded their jurisdiction in awarding interest on the amounts allowed as compensation from the date with reference to which the same were ascertained, namely, the date of the filing of the plan, etc.

Re Canadian Northern R.W. Co. and Robinson (1908), 17 Man. L.R. 396, approved of; *Re Cavanagh and Canada Atlantic R.W. Co.* (1907), 14 O.L.R. 523, dissented from.

Cases decided under the arbitration sections of the Municipal Act distinguished.

Prior to the making of the awards, possession of the lands was taken by the railway company under warrants of possession issued by a Judge, payment into Court being then made by the company of sums deemed sufficient to satisfy the compensation to be awarded:—

Held, that the owners were entitled to have paid to them, out of the moneys in Court, not only the amounts of the compensation awarded, but also interest thereon, not limited to such interest as, according to the practice of the Court, is payable on moneys in Court, but at the legal rate of interest, namely, five per cent., payable from the date of the warrants of possession until the date of the payment out.

Re Lea and Ontario and Quebec R.W. Co. (1885), 21 C.L.J. 154, *Re Taylor and Ontario and Quebec R.W. Co.* (1886), 11 P.R. 371, and *Re Philbrick and Ontario and Quebec R.W. Co.* (1886), 11 P.R. 373, referred to and discussed.

THESE were appeals by the railway company from the awards, dated 23rd December, 1908, made by John Smith and Duncan McGibbon, Esquires, two of the arbitrators appointed under the provisions of the Railway Act, R.S.C. 1906, ch. 37, to determine the compensation to be paid to the respondents respectively for the land taken by the appellants for the purposes of their railway, by which the compensation, in the case of the respondent Robert Clarke, was fixed at \$1,570, and in the case of the other respondents, Margaret and Charles Clarke, at \$1,500, and in each case interest on the sum awarded, at the rate of 5 per cent. per annum from the 14th March, 1907, that being the date of the

deposit by the railway company of the plan, profile, and book of reference, was awarded to the respondents.

The respondents also moved for payment to them, out of the sums paid into Court by the appellants on obtaining warrants of possession, of the compensation so awarded, with interest from the 14th March, 1907.

The appeals and motion were heard before MEREDITH, C.J.C.P., sitting in the Weekly Court, on March 3rd, 1909.

I. F. Hellmuth, K.C., and *Angus MacMurchy*, K.C., for the appellants.

B. F. Justin, K.C., for the respondents.

March 23, 1909. MEREDITH, C.J.C.P.:—At the close of the argument I determined that the appellants had not made a case for reducing the sums awarded as compensation on the ground that they were excessive, and reserved judgment on the two other questions argued: (1) that the arbitrators had no authority to award interest; and (2) that the respondents were not entitled to anything beyond the compensation awarded, except such interest as, according to the practice of the Court, is payable on the amounts awarded as compensation while they have been in Court.

By sub-sec. 2 of sec. 192 of the Act it is provided that the date of the deposit of the plan, profile, and book of reference which a railway company is by sec. 158 required to make, is to be the date with reference to which the compensation or damages which the company is by sec. 155 required to pay are to be ascertained.

The first step to be taken by the company, in case it is unable to agree with a land owner as to the compensation or damages which he is entitled to receive, is to serve upon him a notice describing the lands to be taken or the powers intended to be exercised with regard to any lands described in the notice, and a declaration of readiness to pay "a certain sum or rent" as compensation for the lands or for the damages: sec. 193.

Section 215 deals with the right of the company to take possession, and is as follows:—

"215. Upon payment or legal tender of the compensation or annual rent awarded or agreed upon to the person entitled to receive the same, or upon payment into Court of the amount of such compensation, in the manner hereinbefore mentioned, the award or agreement shall vest in the company the power forthwith to take possession of the lands, or to exercise the right or to do the thing for which such compensation or annual rent has been awarded or agreed upon."

By sec. 217 provision is made for the granting, before an award or agreement has been made, a warrant for possession, on the Judge being satisfied by affidavit that the immediate possession of the lands or of the power to do the thing mentioned in the notice is necessary to carry on some part of the railway with which the company is ready forthwith to proceed; but the warrant is not to be granted until after a prescribed notice or unless the company gives security to the satisfaction of the Judge by payment into Court of a sum, in his estimation, sufficient to cover the probable compensation and costs of the arbitration, and "not less than fifty per centum above the amount mentioned in the notice served upon the party stating the compensation offered:" sec. 218.

The plan, profile, and book of reference, as I have mentioned, were deposited on the 14th March, 1907.

The notice provided for by sec. 193 was served on the 16th July, 1907, and on the 1st August, 1907, warrants for possession were obtained in both cases, \$2,300 in the first case and \$1,800 in the second case having been paid into Court by the company, pursuant to sec. 218.

I am of opinion that the arbitrators had no authority to award interest upon the amounts of the compensation awarded; their authority was only to determine the amount of the compensation, and that they were required to fix as of the date of the deposit of the plan, profile, and book of reference: sec. 192.

It may be and has been said that it is most unjust to a land owner that he should be restricted in his claim to compensation to the value of the land at the date of the deposit of the plan,

profile, and book of reference; that when these have been deposited, the power of the land owner to deal with his land is curtailed, and in the case of a farmer the cropping and cultivation of his land is interfered with, and that, if interest be not allowed, he receives no compensation for the injury caused by so tying up his land; but these are considerations to be urged upon Parliament as reasons for a change in the law, and do not justify a Court in straining the language of the statute so as to obviate inflicting injustice.

The question has recently been considered by the Court of Appeal for Manitoba, in *In re Canadian Northern R.W. Co. and Robinson* (1908), 17 Man. L.R. 396, and, after full consideration and discussion of the various provisions of the Railway Act, the conclusion was reached that "interest on the amount awarded should not be added by the arbitrators, especially in a case where the claimant remains in possession of the property until after the date of the award."

I entirely agree with the conclusion reached by the Manitoba Court and with the reasons given by Mr. Justice Phippen for that conclusion, and differ, therefore, as that Court did, from the view taken by my brother Riddell in *In re Cavanagh and Canada Atlantic R.W. Co.* (1907), 14 O.L.R. 523.

Mr. Justin contended that, according to the decisions of the Courts of this Province, the arbitrators had power to award the interest in addition to the compensation, but with that contention I am unable to agree.

In re Cavanagh and Canada Atlantic R.W. Co., no doubt, supports his contention; but it may be pointed out that in that case the railway company had, under the provisions of what is now sec. 178, obtained from the Board of Railway Commissioners authority to take the lands in respect of which the compensation had been awarded, and, by so doing, as my brother Riddell said (p. 530), made it "practically impossible for the owner to do anything with his land except hold it for the company;" but I am not at all sure that my learned brother would not have reached the same conclusion if that circumstance had not existed.

My learned brother followed *James v. Ontario and Quebec R.W. Co.* (1886), 12 O.R. 624, which, he said, decided that "interest is properly allowed to the land owner on the amount of his compensation from the time of taking," which he interpreted as meaning from the time the land owner knew that he had to give up the land "to the time of the award."

In the *James* case the arbitrators had allowed interest from the time of the service on the land owner of the notice provided for by what is now sec. 193, and all that was decided was that the award was not in that respect open to objection.

There was an appeal in that case to the Court of Appeal (1888), 15 A.R. 1, and one of the objections to the award taken there was that the arbitrators had charged the railway company with interest from the date of the notice to arbitrate, whereas it should only have been charged from the date on which the company took possession of the land. Dealing with this ground of appeal, Osler, J.A., said (p. 10): "The point was somewhat laboured on the argument, but as the difference appears to be, as one of the learned counsel for the company expressed it, 'so small as to be scarcely worth troubling about,' we may adopt that view, and decline to decide it."

The question, therefore, as far as the Court of Appeal is concerned, is left open for future decision.

In *In re Birely and Toronto Hamilton and Buffalo R.W. Co.* (1897), 28 O.R. 468, the arbitrators had allowed interest on the amount awarded from the time the work was completed and the powers were exercised: p. 469; and, in dismissing an appeal against this allowance, Armour, C.J., held that the arbitrators might, in awarding compensation, make an allowance in the nature of interest from the time when the right to compensation accrued: p. 470.

The cases of arbitration under the Municipal Act are distinguishable.

In *In re McPherson and City of Toronto* (1895), 26 O.R. 558, Street, J., pointed out that the effect of the by-law by reason of which the compensation became payable was to vest the land

immediately in the corporation as a public road, and he thought that the land must, therefore, from the date of the passing of the by-law be deemed to have been taken by the corporation, and, therefore, that, as declared by authorities binding on him—mentioning *Rhys v. Dare Valley R.W. Co.* (1874), L.R. 19 Eq. 93; *In re Shaw and Corporation of Birmingham* (1884), 27 Ch. D. 614, 619; *James v. Ontario and Quebec R.W. Co.*, *supra*—the land owner was entitled to interest from the date of the by-law.

The reference by Osler, J.A., in *In re Leak and City of Toronto* (1899), 26 A.R. 351, 357, is to arbitrations under the Municipal Act, and the observations I have made as to the *McPherson* case apply to what was said by him.

As my decision is not subject to appeal to any Ontario or Canadian Court—if, indeed, it be not absolutely final and without appeal to any tribunal, which must remain an open question until the Judicial Committee of the Privy Council has dealt with an appeal taken to it from an adjudication upon an appeal under sec. 209—I am not bound to follow the decision of my brother Riddell, but I am at liberty to follow that of the Manitoba Court, though not binding on me, in preference to it. I take this course the more readily because the question is one arising on a Dominion statute, and it is important that the same construction should be given to it in all the Provinces, and because the Manitoba decision accords with my own view of what the law is.

The result, therefore, of the motions by way of appeal from the awards is that each award must be varied by striking out that part of it which deals with the interest, and that in other respects both motions must be dismissed.

The appellants must pay to the respondents the costs of both appeals, except so much of them as relates to the question of interest, and as to this there will be no costs to either party. I give no costs of this branch of the appeal, because I think that, in view of the *Cavanagh and Canada Atlantic R.W. Co.* case, the arbitrators were justified in awarding interest and the respondents in claiming it.

There remains to be considered the question raised on the motions of the land owners for payment out.

In support of the railway company's contention that the land owners are entitled only to such interest as, according to the practice of the Court, is payable on the amounts awarded as compensation while they have been in Court, counsel referred to *In re Lea and Ontario and Quebec R.W. Co.* (1885), 21 C.L.J. 154; *In re Taylor and Ontario and Quebec R.W. Co.* (1886), 11 P.R. 371; and *In re Philbrick and Ontario and Quebec R.W. Co.* (1886), 11 P.R. 373.

In the *Lea* case the question arose, as in this case, with respect to money paid into Court by the railway company on obtaining a warrant for possession. In the short report of the case it is said that Galt, J., "following *Great Western R.W. Co. v. Jones and Wilkins v. Geddes* (1879), 3 S.C.R. 216, made an order for payment to both parties of their respective shares out of the \$8,000, with interest thereon at the rate of 4 per cent. from date of the taking of possession of the land by the company."

In *Wilkins v. Geddes* no such question arose as is presented for decision in this case. In that case the Minister of Public Works for Canada, under the authority of the Public Works Act, paid to the prothonotary of the Supreme Court of Nova Scotia at Halifax \$6,180, the amount awarded to a land owner as compensation for land appropriated to the use of the Dominion, with six months' interest added; and the question was as to the liability of the prothonotary to pay interest on the sum so paid to him, his contention being that he was not under any such liability; and all that was decided was that he was not entitled to the interest which the money deposited earned while under the control of the Court, and that an order requiring him to pay to the land owner interest on the amount deposited at the rate of four per cent. per annum, there being no evidence as to what had been actually earned, was rightly made, and that the Court had jurisdiction to make it.

Great Western R.W. Co. v. Jones, the other case referred to by Galt, J., is reported (1867) 13 Gr. 355; but is, I think, quite dis-

tinguishable. In that case the question arose owing to a claim by the defendant Jones to land which the principal officers of Her Majesty's Ordnance had agreed to sell to the railway company for £700. Before the purchase money was paid or a conveyance was executed, the railway company took possession. Jones then brought an action of ejectment against the railway company, and the company instituted a suit in Chancery to restrain the action and for other relief. Jones claimed as mortgagee of Sir Allan McNab, and he and Lady McNab and the Principal Secretary of State for the War Department and the Attorney-General for Upper Canada were made defendants to this suit. The Vice-Chancellor held that the plaintiffs were entitled to a conveyance of the land on payment of the £700 sterling, with interest, and that Jones was not entitled to any part of that sum, but was unable to decide whether the Provincial Government or the Ordnance Department was entitled to the money, and the Vice-Chancellor therefore ordered that the money be paid into Court, with liberty to the Attorney-General and the Secretary of War to apply as they might be advised. On settling the minutes of the decree, a question arose as to the railway company's liability to pay interest. It was contended by the railway company that it had had at its credit with its bankers ever since the 2nd August, 1860, more than the amount of the purchase money, and that it had on that day given notice to the War Department of an appropriation of money to meet the sum the railway company was to pay, and all that was decided was that, in the circumstances of that case, there was no such appropriation as relieved the railway company of liability to pay interest on the purchase price after it had taken possession.

In Fry on Specific Performance, 4th ed., par. 1445, it is said: "It follows from the principles already stated and discussed in this chapter that, generally, in the absence of stipulation, a purchaser in possession of the estate which is the subject matter of the contract must pay interest on the unpaid purchase money from the time when his possession under the contract commenced until completion." And in par. 1450 it is stated: "But where

a purchaser had been let into possession at the intended time for completion, and afterwards, difficulties having without any fault on his part arisen to delay completion, paid the purchase money into a separate account at a bank, and gave notice to the vendors that the money was appropriated to the purposes of the contract, and that he was ready to complete, Lord Romilly, M.R., held that he was not chargeable with interest after the date of his notice, but must pay to the vendors any interest he had received from the bank in respect of the sum paid in."

The case in which this was decided is *Kershaw v. Kershaw* (1869), L.R. 9 Eq. 56; and it was upon the principle of it that the railway company, in *Great Western R.W. Co. v. Jones*, relied to relieve it from liability to pay interest after what was claimed to have been an appropriation had been made, and notice of it had been given to the War Department.

This principle has, in my opinion, no application to the cases with which I have to deal. Here the payment into Court was a matter entirely for the benefit of the railway company. It desired, in advance of the time when, in the ordinary course, it would have been entitled to possession, to be let into possession, and the money paid into Court as the condition of obtaining the warrants of possession was paid in only as security to the land owners for the compensation money to which they were entitled, and the amount of which, through no fault of theirs, had not yet been ascertained, and it would be most unjust to them that moneys so paid in, for which but a very low rate of interest is allowed by the Court, and which they had no means or opportunity of requiring to be invested, should be treated as if it had been paid to them, and that they should be entitled only to the interest payable according to the practice of the Court, when they had been deprived of possession of their land for the benefit of the railway company, and the delay in completing the purchase was in no way due to fault on their part.

The principle upon which appropriation of the purchase money has been held to prevent interest from running is stated by an eminent text-writer to be extremely unsatisfactory, and the writer

adds: "Whether there is, or is not, an express stipulation for the payment of interest, it is equally difficult to see why any dealing with the purchase money short of payment to the vendor under the contract should prevent interest being payable. It must surely be in the power of the vendor to stand upon his legal rights and say '*non hæc in foedera veni*,' unless, in attempting to avail himself of those legal rights, he is in substance seeking to take advantage of his own wrong. The authorities, however, appear to establish that appropriation may in certain cases prevent interest from running, though it is believed that these authorities have not been followed in unreported cases by eminent Judges." Dart on Vendors and Purchasers, 7th ed., pp. 658.

Agreeing, as I do, with the view thus expressed, I am not disposed to extend the application of the rule or supposed rule beyond what is covered by decided cases which it is my duty to follow.

In *In re Taylor and Ontario and Quebec R.W. Co.*, 11 P.R. 371, by consent of the land owner and the railway company \$9,000 had been paid into Court on the company obtaining a warrant for possession, and before the amount of the compensation had been determined, and O'Connor, J., held, on the authority of *Great Western R.W. Co. v. Jones*, *In re Lea*, and *Wilkins v. Geddes*, that the land owner was entitled only to the rate of interest earned by the fund in Court. In *In re Philbrick* the question was as to the rate of interest to be allowed after the award, and the learned Chancellor, while he said that it was his duty to follow *In re Lea*, and that he thought he would have reached the same conclusion independently of it, pointed out that when the award was made, as it was not complained of by either party, it was competent for the proprietor to have applied for and obtained the amount then awarded to him.

It may be pointed out that in the cases in which the railway company is authorized to pay the compensation into Court, it is required to pay in, in addition to the compensation, six months' interest on it: sec. 210; and that provision is made that where an order for distribution, payment, or investment is made within

six months after the payment into Court, a proportionate part of the interest is to be returned to the company.

It seems not very consistent with this requirement that the land owner, where the railway company, for its own purposes, compels him to give up possession, should not be entitled to interest on the compensation from the time of taking possession, but is to be left to look to the interest which is earned by so much of the fund as equals the amount of the compensation according to the practice of the Court, which may be nothing, and certainly will be much less than legal interest on the amount of the compensation, although the money in Court is in no sense his, but stands only as security for the payment of the compensation, which, as I have said, he has no power to withdraw, and the investment of which so as to earn interest he has no right to require.

In my opinion, the land owners are entitled to be paid out of the moneys in Court the amounts of compensation awarded to them respectively, with interest at five per cent. per annum from the date of the warrants of possession, and there will be an order accordingly, and the railway company must pay the costs of the motions for payment out.

FIRES—RAILWAY ACT—INTERPRETATION.

ONTARIO.]

[DIVISIONAL COURT.]

CAMPBELL V. CANADIAN PACIFIC R.W. CO.

(18 O.L.R. 466.)

Railway—Fire from Locomotive—Damage to "Standing Bush"—Conflicting Evidence—Findings of Jury—Dominion Railway Act, sec. 298—"Lands"—"Plantations"—Interpretation of Statutes.

In an action brought under sec. 298 of the Railway Act, R.S.C. 1906, ch. 37, to recover the amount of damage caused to "standing bush" on the plaintiff's land by a fire, alleged to have been started by a locomotive of the defendants, there was a conflict of evidence as to whether the fire which actually did the damage spread to the plaintiff's land from a fire started by the defendants' locomotive, or from a fire started on the land of one H.:—

Held, that there was evidence to justify the written finding of the jury that the damage to the plaintiff's property was caused by fire from the defendants' locomotive, and that an apparently inconsistent oral response made by the foreman to a question put by the trial Judge was, on the evidence, reconcilable with the written finding.

Held, also, that "standing bush" comes within the provisions of sec. 298, being included in "lands," notwithstanding the occurrence of "plantations" in the words of the enactment, "crops, lands, fences, plantations, or buildings and their contents."

In regard to legislation of this kind, the rule is to adopt the construction most beneficial to the public: see sec. 15 of the Interpretation Act, R.S.C. 1906, ch. 1, sec. 15.

APPEAL by the defendants from the judgment of Falconbridge, C.J.K.B., upon the findings of a jury, in favour of the plaintiff, in an action to recover damages for destruction of the plaintiff's property by fire, alleged to have been started by sparks escaping from a locomotive of the defendants. The facts are sufficiently stated in the argument and judgment.

The appeal was heard by a Divisional Court composed of BORD, C., MAGEE and LATCHFORD, JJ., on the 26th May, 1909.

I. F. Hellmuth, K.C., and *W. L. Scott*, for the defendants. The action is brought under sec. 298 of the Railway Act. The plaintiff's contention is that a fire on certain lots, which was admittedly caused by the defendants, spread to his lot and caused the damage complained of, while the latter contend that the damage was done by a fire which originated on another lot (Hourigan's), and was not caused by the defendants. The jury found that it was the fire on Hourigan's lot which caused the damage, which is inconsistent with their finding that it was caused by the defendants. On the evidence the jury could not properly find the defendants liable, and the trial Judge should have entered judgment for them on the jury's finding that the fire started on Hourigan's lot. The damages were assessed at \$424, of which \$350 was for damage to "standing bush." Such damages cannot be recovered under sec. 298, which only covers damages to "crops, lands, fences, plantations, or buildings and their contents." The use of the specific term "plantations," which cannot apply to bush timber, excludes the wide general meaning which would otherwise be given to the term "lands:" Maxwell on Interpretation of Statutes, 4th ed., p. 489; *The King v. Inhabitants of Sedgley* (1831), 2 B. & Ad. 65; *Thursby v. Churchwardens, etc., of*

Briercliffe-with-Extwistle, [1895] A.C. 32. In the *Sedgley* case, the head-note states that the express mention of coal-mines in the statute 43 Eliz. ch. 2, sec. 1, is a virtual exclusion of all other mines, and the principle of the *Thursby* case is similar. In *Fraser v. Pere Marquette R.R. Co.* (1909), 13 O.W.R. 883, the Court of Appeal has held that the statute is to be strictly construed so as to include only such kinds of property as are undoubtedly designated by the terms used.

R. A. Pringle, K.C., for the plaintiff. The evidence sufficiently supports the finding of the jury that the fire which did the damage was caused by the defendants, and many cases shew that in such a case their verdict should not be interfered with. I refer to *Smith v. South Eastern R.W. Co.*, [1896] 1 Q.B. 178; *McArthur v. Dominion Cartridge Co.*, [1905] A.C. 72; *Connecticut Mutual Life Insurance Co. of Hartford v. Moore* (1881), 6 App. Cas. 644; *Metropolitan R.W. Co. v. Wright* (1886), 11 App. Cas. 152. "Lands" should receive its usual and natural construction as including the timber standing upon them. I refer to *Northern Counties Investment Trust Limited v. Canadian Pacific R.W. Co.* (1907), 13 B.C.R. 130; *Blue v. Red Mountain R.W. Co.* (1907), 6 Can. Ry. Cas. 219; *Grant v. Canadian Pacific R.W. Co.* (1904), 36 N.B.R. 528; *McNeill v. Haines* (1889), 17 O.R. 479.

Hellmuth, in reply, referred to *Ewer v. Hayden* (1594-7), 1 Cro. Eliz. 476, 658, followed in *In re Portal and Lamb* (1885), 30 Ch.D. 50.

June 5, 1909. The judgment of the Court was delivered by BOYD, C.:—In September (two or three weeks after the fire started) Campbell saw the fire where it had crossed from Warner's to Hourigan's farm, about 300 feet north of the Payne river, and went across about 100 feet east of the line (i.e., between the lots). It was burning slowly then. No fire had then crossed on Hourigan's, north of the Payne, though it was burning to the south of that creek at that time. This date is later than the 9th September, spoken of by the defendants' witnesses.

D. Grant was down fighting the fire, and to keep it from getting into the 4th concession. The fire was on the head-line between

the 3rd and 4th concessions, and came from a south-westerly direction off the Warner and Hourigan lots, and coming from both properties. He was with Cameron, who says that the fire crossed the head-line on the 15th October about four o'clock. It crossed from Hourigan's place. According to this evidence, the fire started by the railway on Warner's place had crossed the creek to the north and worked into Hourigan's place (before the fire in Hourigan's place to the south had reached the creek). And this fire had between the middle of September and the middle of October worked up to the head-line between the 3rd and 4th concessions.

For the defence Warner says that there was a fire started on Hourigan's land on the 23rd August, about an acre distant from the railway, and extended north so as to cross Payne river or creek on the 9th September, and then burned slowly back (i.e., north), and went over the head-line (between the 3rd and 4th concessions) on the 16th October. This fire, he says, went ahead of the Canadian Pacific Railway fire (i.e., from Warner's), and that this fire went across the head-line into Cameron's bush.

Flanagan says Warner's fire was not across the creek on the 9th September, but was to the south of it (p. 25), and that there was no connection between Hourigan's fire and Warner's north of the creek that day.

Warner's evidence is subject to the observation that he had made a conflicting statement, before action, to the effect that he then thought or supposed that it was the Canadian Pacific Railway fire which caused the destruction.

But the evidence as it stands is directly contrary on this critical point, and it was for the jury to pass upon it. Taking the answers to the questions, it is clear that the jury believed that the damage to the plaintiff was caused by fire or sparks from the railway. This, to my mind, is the controlling finding. Afterwards, upon their return to Court with the written answers, the foreman of the jury said, in answer to the Judge's question, "Did you find that the fire started on the Hourigan lot, or on the Barker, Hough, or Warner lot?" "On the Hourigan lot."

I would not, on this conflicting evidence, allow that *viva voce*

answer, on the spur of the moment, to overweigh the deliberate response in writing. Several explanations may be given of the oral response. The jury may have believed that the first fire of Hourigan's was put out, as he says, and that the later fire on his place was started by sparks from the locomotive. They may have adopted the view, even though Hourigan had not put out the fire, as he says, still that that fire originated from the railway's fires, though the place was an acre from the track. And, again, they may have accepted the evidence of the plaintiff and looked upon Warner's as the leading fire, which first went into Hourigan's north of Payne creek and then spread to the head-line and over into the 4th concession, and thence down on the plaintiff. This course of the fire is delineated on the plaintiff's plan, made by Milden, P.L.S. All agree that the fire that devastated the plaintiff's land came from or out of Hourigan's bush to the north of Payne river, though it may not have "started" in Hourigan's. If the whole response is read thus, we find that the fire was caused by sparks allowed to escape from the locomotive of the defendants, which started in Warner's lot and burned up through Hourigan's lot, joining a fire on Hourigan's lot, also started by the company's locomotives, and from Hourigan's going over the 4th concession, and thence driven by the wind into the plaintiff's bush to the south of the concession. If so expanded, there is evidence to justify all these details.

Altogether, looking at the comparative smallness of the verdict and the nature of the evidence, no good result would follow from a further prolongation of the contest. A new trial in this kind of case is to be deprecated, and there is evidence to support amply the written findings, and sufficiently to support the oral answer of the foreman, which should be read so as to harmonise with the main finding.

This leaves to be considered the question on the construction of the statute R.S.C. 1906, ch. 37, sec. 298.* The argument is that

* 298. Whenever damage is caused to crops, lands, fences, plantations, or buildings and their contents, by a fire, started by a railway locomotive, the company making use of such locomotive, whether guilty of negligence or not, shall be liable for such damage and may be sued for the recovery of the amount of such damage in any court of competent jurisdiction. . . .

"standing bush" is not covered by its language, which extends to damage "caused to crops, lands, fences, plantations, or buildings and their contents." Though it is conceded that "lands," standing alone, includes a forest thereon, yet, as trees of a particular kind are specified in the word "plantations," the recognised rules of statutory construction require us to hold that "standing bush" comes neither under the specific term "plantations" nor the general term "lands."

This is the argument, and cases are cited to support it. The cases cited are of a twofold character: (1) as to imposing of rates, *i.e.*, fiscal Acts; and (2) cases on the construction of wills. The latter authorities, as to wills, are not rightly available on the construction of statutes, in which not the individual but the public is speaking. In the former cases, as to taxation, statutes are always strictly construed so as not to impose payment unless the language is conspicuously plain. But in legislation of this kind, giving damages for injury to property by railways, the rule is to adopt the construction most beneficial to the public, and that rule of liberal construction is indeed expressly so declared as to our body of consolidated or revised statutes by the Interpretation Act, R.S.C. 1906, ch. 1, sec. 15, by which such fair, large, and liberal construction and interpretation is to be given as will best ensure the attainment of the object of the Act, according to its true intent, meaning, and spirit. I hesitate to allow the unusual word "plantations" control, and reduce the large meaning of the word "lands" used in this section. So to do would appear to me to be invoking technicality to do away with the substantial advantages contemplated by the Legislature. "Plantation" means something planted out by the hand of man; a standing, *i.e.*, a growing, bush is something planted by the hand of nature, which is rooted in the soil and forms part of the land itself. Clearing land means removing the timber and trees thereon, and damaging land by fire would be damaging the trees, and, it may be, the soil itself. Cases turning upon the rating of property for the poor in the time of Elizabeth, upon which those cited to us were based, may not properly control recent legislation in this land of farms and forests, which are being injured by the

passage of locomotives. "General words in a statute," says Sir William Grant, "must receive a general construction; unless you can find in the statute itself some ground for limiting and restraining their meaning by reasonable construction, and not by arbitrary addition or retrenchment:" *Beckford v. Wade* (1811), 17 Ves. 87, 91. In *The Queen v. Justices of Liverpool* (1883), 11 Q.B.D. 638, Bowen, L.J., said: "We should not readily acquiesce in a non-natural construction which limits the operation of the section so as to make the remedy given by it not commensurate with the mischief which it was intended to cure . . . The Courts sometimes do violence to the language of an Act of Parliament in order to cure a mischief, but certainly they ought not to do violence to the language or to read it in an unnatural sense when the effect of so reading it would be to leave the mischief uncured, or to a great extent uncured:" pp. 649, 650.

I am content to leave the matter in this way, upholding the award of damages in respect of the bush land.

The appeal should be dismissed with costs.*

*On the 21st June, 1909, leave to appeal from this judgment was given by an order of Moss, C.J.O., in Chambers, but the appeal was confined to the question arising under sec. 298 of the Railway Act.

NOTE.—Subsequently this case was settled.

FIRES—NEGLIGENCE—PROXIMATE CAUSE.

SASKATCHEWAN.]

[NEWLANDS, J.

CAIRNS V. CANADIAN NORTHERN R.W. CO.

(2 Sask. L.R. 71.)

*Railway company—Destruction of property by spark from locomotive—
Negligence of defendant—Proximate cause.*

Plaintiff was the owner of a warehouse in close proximity to defendant's railway. Within six feet of the warehouse he piled a quantity of hay, which became ignited by a spark from a locomotive on the railway, and the fire spread to the warehouse, which was totally destroyed. The jury found

that the fire originated from the defendant's engine, but that the plaintiff had been guilty of negligence in storing the hay in such close proximity to the railway:—

Held, that as the jury had found the plaintiff negligent, and as such negligence was the proximate cause of the damage, he could not recover.

THIS was an action for damages for the destruction of the plaintiff's warehouse by fire originating from an engine of the defendant company, and was tried before Newlands, J., at Saskatoon.

Jas. Straton and H. L. Jordan, for the plaintiff.

O. H. Clark and J. D. Ferguson, for the defendant.

January 20, 1909. NEWLANDS, J.:—This is an action for burning plaintiff's warehouse and contents. The jury found that the fire was caused by defendant company; that they used modern and efficient appliances, but were otherwise guilty of negligence; that plaintiff was guilty of contributory negligence by placing baled hay on his property too close to his warehouse.

The evidence shewed that a pile of baled hay was set on fire by a spark from defendant company's locomotive, that the fire was communicated from the hay to the warehouse, which, with the contents, was totally destroyed. This hay was piled within six feet of the warehouse by plaintiff, and the jury have found that this was negligence on his part.

It was urged by plaintiff that he had the right to use his property as he saw fit, and was not compelled to protect it against the negligence of any other party. In support of this contention he cited the dictum of Strong, J., in *New Brunswick Railway Co. v. Robinson* (1886), 11 S.C.R. 688, p. 696. This dictum is based upon *Fero v. Buffalo, etc., R.W. Co.*, 22 N.Y. 209, and *Grand Trunk R.W. Co. v. Richardson*, 91 U.S. 454-473; also *Jaffery v. Toronto, Grey, and Bruce R.W. Co.*, 23 U.C.C.P. 553; *Holmes v. Midland R.W. Co.*, 35 U.C.Q.B. 253; *McLaren v. Canada Central R.W. Co.*, 32 U.C.C.P. 324; and *Campbell v. McGregor*, 29 N.B.R. 644. In none of these cases did the jury find that the plaintiff was guilty of negligence, and therefore I do not think that they are authorities that I should follow in this case.

The jury having found that the plaintiff was negligent in piling hay too close to his warehouse, and this action being for the loss of the warehouse and contents, not for the loss of the hay, it follows that if plaintiff had exercised more care in piling the hay, that is, had piled it at a greater distance from his warehouse, as a prudent man would have done, knowing, as he must have known, that there was danger in the hay being set on fire by sparks from defendants' locomotives, his warehouse would not have been burnt.

Having left the question of contributory negligence to the jury, and the jury having found as they did, I have to enter judgment for defendants with costs.

NOTE.—This case was subsequently settled.

FIRES—RAILWAY ACT—INTERPRETATION.

ONTARIO.]

[COURT OF APPEAL.

FRASER V. PERE MARQUETTE R.W. Co.

(18 O.L.R. 589.)

Railway—Destruction of "Crops"—Sparks from Locomotive—Marsh Hay Cut and Baled—Railway Act, R.S.C. 1906, ch. 37, sec. 298.

The Railway Act, R.S.C. 1906, ch. 37, sec. 298, enacts that "whenever damage is caused to crops . . . plantations, or buildings and their contents, by a fire, started by a railway locomotive, the company making use of such locomotive, whether guilty of negligence or not, shall be liable for such damage:"—

Held, that the plaintiff was not entitled to recover under the above section in respect to marsh hay cut at some distance from the railway and baled and piled on the property of another person along a siding of the defendants, to which place it had been carried while awaiting shipment, and where it had been destroyed by fire caused by sparks from one of the defendants' locomotives.

Judgments of TEETZEL, J., and a Divisional Court reversed.

THIS was an appeal by the defendants from the judgment of a Divisional Court affirming the judgment of TEETZEL, J., at the trial, in favour of the plaintiff for \$375 damages.

The action was brought by the plaintiff to recover damages caused to a quantity of marsh hay belonging to him, which was at the time lying upon the ground of the Wallaceburg Sugar Co. at Wallaceburg, by reason of a fire alleged by him to have been caused by a spark from a locomotive engine of the defendants.

The action was tried at Chatham on June 15th, 1908.

A. B. Carscallen, for the plaintiff.

F. Stone and W. E. Gundy, for the defendants.

July 9, 1908. TEETZEL, J.:—Action for damages under sec. 298 of the Railway Act of Canada, R.S.C. 1906, ch. 37, which provides that “whenever damage is caused to crops, lands, fences, plantations, or buildings and their contents, by a fire, started by a railway locomotive, the company making use of such locomotive, whether guilty of negligence or not, shall be liable for such damage and may be sued for the recovery of the amount of such damage in any court of competent jurisdiction,” etc. The plaintiff owns a quantity of marsh land from which he annually cuts grass commonly called marsh hay. It is also called sea grass, and besides being used for fodder it is used in the manufacture of mattresses. A large quantity of it had been cut and baled, and at the time of its destruction was piled along a siding used by the defendants in connection with the Wallaceburg Sugar Refinery—awaiting shipment. I found at the trial as a fact that the hay was destroyed by fire caused by sparks from one of the defendants’ locomotives, and that the value was \$375. Two questions arise for determination:—

1. Was the material covered by the word “crops” in sec. 298?
2. If it was a crop while in the field, did it lose that character when baled and delivered for shipment?

In the Standard Dictionary the word “crop” is defined as “plants or grains collectively that are cultivated for consumption; also, the soil product of a particular kind, place, or season. Anything gathered and stored at a proper time and for future use.”

The grass in question is a perennial, and, besides the work of

cutting and gathering, the only work bestowed upon the ground consists in burning off, every spring, the old growth of the former year.

I am of the opinion that if this material had been destroyed in the field, whether before or after it had been cut, it would be well within the above definition of the word "crop."

Mr. Stone presented a very ingenious argument, that, conceding the above to be the correct view, when the material was removed from the farm and piled along the defendants' track for shipment it lost the character of "crop" within the contemplation of sec. 298, and became merchandise. I am unable to adopt this argument. The Legislature has not made provision in respect of crops in any particular place or while on a farm only, but in respect of crops generally, no matter where situate.

Judgment will therefore be for the plaintiff for \$375 and interest since issue of writ, and costs.

The defendants appealed to the Divisional Court, and their appeal was heard on October 6th, 1908, before FALCONBRIDGE, C.J.K.B., and BRITTON and RIDDELL, JJ.

D. L. McCarthy, K.C., and W. E. Gundy, for the defendants.

A. B. Carscallen, for the plaintiff.

October 22, 1908. RIDDELL, J.:—This is an appeal from the judgment of Mr. Justice Teetzel.

The plaintiff owns a quantity of marsh lands, far removed from the line of the defendants' railway. Upon this kind of land is grown a kind of wild grass called sea grass or wild hay, sometimes used for fodder, but generally baled up and sent away for use in the manufacture of mattresses. The grass in question had been grown upon the land already mentioned, there baled up, and sold (as the evidence has it) to a firm in Toronto for making mattresses. As it had to be shipped over the defendants' line of railway or an electric railway, the plaintiff obtained permission from the Wallaceburg Sugar Co. to pile the grass on their land near the railway of the defendants for the convenience of shipment, and had ac-

cordingly drawn the bales and there piled them in three piles. After the hay or grass had been so piled for a month or six weeks, it was burned by fire originating in sparks from the defendants' locomotive. No negligence was proved on the part of the defendants, but my learned brother considered this not necessary under the statute, and held the defendants liable, giving judgment against them for \$375 and costs. The property was still in the plaintiff and not in the purchaser.

At the common law, one setting fire on his own premises was obliged to see to it that it did not escape; he was liable to an action if it burned the property of another, and could get rid of liability only by shewing that the spreading to his neighbour's was due to violence of the wind or something of that nature.

Turberville v. Stamp (1698), 12 Mod., p. 152: "Every man must so use his own as not to injure another. The law is general; the fire which a man makes in the fields is as much his fire as his fire in his house . . . and he must at his peril take care that it does not, through his neglect, injure his neighbour; if he kindle it at a proper time and place, and the violence of the wind carry it into his neighbour's ground and prejudice him, this is fit to be given in evidence." I do not give any other reference, as the whole matter is fully discussed in *Furlong v. Carroll* (1881), 7 A.R. 145; see pp. 157 *et seq.*, in which the cases in our own Courts are mentioned and in part considered.

The statutes of Anne, (1707) 6 Anne ch. 31, and (1711) 10 Anne ch. 14, relieved from liability those in whose house any fire shall accidentally begin, and this exemption was extended by (1774) 14 Geo. III. ch. 78.

It was not long after the successful application of steam power to locomotion that the question was brought up as to the liability of railway companies for fire caused by their locomotive engines. In a number of cases it was more than suggested that in case of fire so caused the companies became insurers; *e.g.*, in *Blyth v. Birmingham Waterworks Co.* (1856), 11 Exch. 781, at p. 783, Martin, B., says: "I held, in a case tried at Liverpool in 1853, that if locomotives are sent through the country emitting sparks, the

persons doing so incur all responsibility of insurers: that they were liable for all the consequences. I invited counsel to tender a bill of exceptions to that ruling."

At length the matter came up squarely for decision in *Vaughan v. Taff Vale R.W. Co.* (1858), 3 H. & N. 743. A wood adjoining the defendants' railway was burnt by sparks from the locomotives. On several previous occasions it had been set on fire and the company had paid for the damages. It was shewn that the defendants had done everything that was practicable to make the locomotives safe, but it was admitted that with these precautions the locomotives had been the means occasionally of setting fire to the wood. In this state of facts, Bramwell, B., the trial Judge, held that the jury were justified in finding a verdict for the plaintiff, and his ruling was upheld by the full Court of Exchequer, composed of Pollock, C.B., Martin, Bramwell, Watson, and Channell, BB. Upon appeal, the Court of Exchequer Chamber (1860), 5 H. & N. 679, reversed the judgment, and laid down the rule that a railway company authorized by the Legislature to use locomotive engines, are not responsible for damage by fire, provided they have taken every precaution in their power and adopted every means which science can suggest to prevent injury from fire and are not guilty of negligence in the management of the engine.

This continues to be the law in England; and it was at once accepted and acted on by our Courts.

When the new Railway Act of 1903, 3 Edw. VII. ch. 58 (D.), was passed, it contained a provision (sec. 239) entirely changing the existing law.

"239 (2). Whenever damage is caused to crops, land, fences, plantations, or buildings and their contents, by a fire, started by a railway locomotive, the company making use of such locomotive, whether guilty of negligence or not, shall be liable for such damage."

"3. The company shall have an insurable interest in all such property upon or along its route, for which it may be so held liable, and may procure insurance thereon in its own behalf."

This in the revision became R.S.C. 1906, ch. 37, sec. 298 (1)

and (3), a slight verbal change appearing in sub-sec. 3, "for which it may be held liable to compensate the owners for loss or damage by fire caused by a railway locomotive, and may procure," etc., etc.

The argument of the appellants is threefold: (1) while admitting that the grass or hay is "crops" while growing, and even while on the premises of the grower, it is argued that it had ceased to be "crops" at the time of the fire; (2) the statute intended, it is argued, to render the railway company liable in the absence of negligence only for such property as insurance could be procured upon, and no insurance could be procured upon such property so situated by the railway company; (3) contributory negligence on the part of the plaintiff in piling hay so near the track of the railway company, and in a place of danger.

It is a matter of common knowledge that our legislation was based upon the legislation in some of the United States. I have thought it proper to examine with some care the legislation of such of the States as are stated to have such statutory provisions, and the cases upon such legislation.

In Massachusetts, as early as 1837, it was provided that railway companies should be liable for all injury caused to the buildings or other property of others by fire from their locomotives, "unless the said corporation shall shew that they have used all due caution and diligence and employed suitable expedients to prevent such injury." And "that any railroad corporation shall have an insurable interest in property along its route for which it might be so held liable in damages, and might procure insurance thereon in its own behalf." Similar legislation still exists in some of the States—*e.g.*, Vermont. In 1840 this statute was repealed in Massachusetts and re-enacted, leaving out, however, the saving clause and making the responsibility of the railway company absolute and independent of negligence. And similar legislation is now to be found in certain other of the States.

Looking now at the legislation and cases, the three points of argument of the appellants will be borne in mind. In the examination of the cases everything which would bear at all upon the present has been set out once for all.

In Massachusetts, the statute 1840, ch. 85, sec. 1, reads in part: "When any injury is done to a building or other property of any person or corporation by fire communicated by a locomotive engine of any railroad corporation, the said railroad corporation shall be held responsible in damages to the person or corporation so injured:" *Luke Hart v. Western Railroad Corporation* (1847), 13 Met. 99, the case of first impression (buildings and contents and trees); *John Ross v. Boston and Worcester Railroad Co.* (1863), 6 Allen 87; *Pierce v. Worcester and Nashua Railroad Co.* (1870), 105 Mass. 199 (farm house, outbuildings and contents). In *William P. Perley v. Eastern Railroad Co.* (1868), 98 Mass. 414, the property burnt was wood upon the plaintiff's land—the fire had caught in grass and stubble near the railroad track and ran rapidly over the lots of intervening proprietors about half a mile, and then caught in the plaintiff's wood and burnt it. It was held that the statute applied, the fire having proceeded from the defendants' locomotive in a direct line, and without any break, to the plaintiff's property: *Edward Safford v. Boston and Maine Railroad Co.* (1870), 103 Mass. 583 (fire from engine burnt a wood pile of defendants, then spread to and burnt a freight house, and then the house of the plaintiff, 1,600 feet from the station house and 740 feet from the railroad track); *Ingersoll v. Stockbridge and Pittsfield Railroad Co.* (1864), 8 Allen 438 (buildings (?)); *Lymon v. Boston and Worcester Railroad Corporation* (1849), 4 Cush. 288 (buildings); *Trask v. Hartford and New Haven Railroad Co.* (1860), 16 Gray 71 (machinery, tools, etc., in a building, and a fence). In this case, Hoar, J., says, p. 72: "A fence is not so commonly insured, probably because its value and risk do not make insurance desirable, but it certainly can be insured, and is insurable. Whether a just construction of the statute of 1840 would require any limitation of the extremely comprehensive language used to define the liability of the railroad corporation created by it, this case gives us no occasion to consider. We certainly do not intend to intimate, by putting our decision upon the ground above stated, that the property must be insurable, in the ordinary or commercial sense of that word, to make the corporation liable."

New Hampshire, introduced first in 1850: "The proprietors of every railroad shall be liable for all damages which shall accrue to any person or property by fire or steam from any locomotive or other engine on such road:" *Hooksett v. Concord Railroad* (1859), 38 N.H. 242 (bridge burnt by fire from a bridge of the defendants burnt by fire from one of their engines); *Rowell v. Railroad* (1876), 57 N.H. 132 (saw mill and machinery); *Smith v. Boston and Maine Railroad* (1884), 63 N.H. 25 (barn buildings and contents); *Laird v. Railroad* (1882), 62 N.H. 254 (building on another's land).

In Vermont General Statutes, ch. 28, sec. 78, the railroad company are relieved if they can prove "that they had used all due caution and diligence, and employed suitable expedients to prevent such injury:" *Cleaveland v. Grand Trunk R.W. Co.* (1869), 42 Vt. 449 (house, etc.); *Grand Trunk R.W. Co. v. Richardson* (1875), 91 U.S. 454 (buildings).

Connecticut, in 1881, ch. 92: "When any injury is due to a building or other property of any person or corporation by fire communicated by a locomotive engine of any railroad corporation, without contributory negligence on the part of the person or corporation entitled to the care and possession of the property injured, the said railroad corporation shall be held responsible in damages to the extent of such injury to the person or corporation so insured; and any railroad corporation shall have an insurable interest in the property for which it may be so held responsible in damages along its route, and may procure insurance thereon in its own own behalf:" *Grissell v. Housatonic R. Co.* (1887), 9 Atl. Rep. 137, 54 Conn. 447 (fences, growing trees and herbage). In this case, at p. 468, the Court speaks of the disagreement as to construction of the statute, and adds: "In the State of Maine it is extended to all property having a permanent location along the route, such as buildings and their contents, fences, trees and shrubbery; but it is held not to extend to a pile of cedar posts, temporarily deposited near the railroad," citing the *Chapman* and *Pratt* cases. The Court continues: "The statute would be extremely uncertain if its enforcement depended on the ability of the railroad to obtain insurance. The withdrawal of insurance companies from issuing

policies in a particular State, owing to unfriendly legislation, or an alteration of their charters, might in effect nullify the law as to railroads in that State;" and comes to the conclusion that the evidence to shew that no insurance could be effected upon fences, growing trees, and herbage was rightly rejected, the liability of the railroad company depending upon the construction of the statute and requiring no separate consideration. The defendants were held liable: *Simmonds v. New York and New England R.R. Co.* (1884), 52 Conn. 264 (peat, standing wood, and fences).

Michigan, 1 How., Stat. 3378: Railroad companies are liable for all loss, etc., "provided that such railroad company shall not be held so liable if it prove to the satisfaction of the Court or jury that such fire originated from fire by engines, whose machinery, smoke stack or boxes were in good order and properly managed," etc., etc.: *Peter v. Chicago and West Michigan R.R. Co.* (1899) 121 Mich. 324 (lumber in mill yard).

Missouri Rev. Stat. 1889, sec. 2615: "Each railroad corporation owning or operating a railroad in this State shall be responsible in damages to every person or corporation whose property may be injured or destroyed by fire communicated directly or indirectly by locomotive engines in use upon the railroad owned or operated by such railroad corporation, and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it, and may procure insurance thereon in its own behalf for its protection against such damages:" *Mathews v. St. Louis and San Francisco R.R. Co.* (1893), 121 Mo. 298, (1896), 165 U.S. 1 (house, barn and outbuildings, personal property therein, trees and shrubbery). At p. 315, Gantt, J., giving the leading judgment, says: "When it was demonstrated that it was a common occurrence, that the company had the right to run its trains at all times of day and night, and the injured party was powerless often to shew negligence, on account of his inability to shew what particular train had set out the fire, or the particular cause of the fire, and because the owner was entirely innocent in the premises of any negligence, it was determined by the legislation that when one of two innocent parties must suffer,

the one who operated the dangerous agency should suffer the loss:" *Campbell v. Missouri Pacific R.R. Co.* (1894), 121 Mo. 340, 24 S.W. 591 (building, fences, shrubbery, etc.); *Adams v. St. Louis and San Francisco R.R. Co.* (1894), 28 S.W. 496 (nursery stock planted by lessee, on agreement with lessor that it might be removed by lessee). In both of the two last-named cases, the argument was raised that the railway company could not get insurance upon the property and consequently (as was argued) the company was not liable for such property. The Maine cases were relied upon, but the Court refused to follow them. "We do not think it necessary to the validity of the statute that the railroad corporations should have been given an insurable interest in the property upon the route of their roads; nor does the fact that such interest was given limit their responsibility to insurable property that may be injured or destroyed. The purpose of the law was to give the corporation the same right and opportunity of protection, and indemnity from fires, as the owner of the property had. What property is the subject of insurance must be determined by the insurance companies, whether the indemnity is sought by the owner or by the corporation:" *Campbell v. Missouri Pacific R.R. Co.*, 121 Mo. 340, at p. 352; see, also, *Matthews v. Missouri Pacific R.R. Co.* (1898), 142 Mo. 645 (barn, etc.).

Iowa Code, 1873, sec. 1289: "That any corporation operating a railway shall be liable for all damages by fire that is set out or caused by the operating of any such railway" *Rodemacher v. Michigan and St. Paul R.R. Co.* (1875), 41 Iowa 297 (fences and timber); *West v. Chicago and North-Western R.R. Co.* (1889), 77 Iowa 654 (stacks of hay).

Colorado (1874) Gen. Stat., sec. 2798: "Every railroad corporation operating its line of road, or any part thereof, in this State, shall be liable for all damages by fire that is set out or caused by operating any such line of road, or any part thereof:" *Union Pacific R.R. Co. v. De Busk* (1888), 12 Colo. 294, 20 Pac. Rep. 752 (hay). The hay was set on fire from growing grass to which fire had been communicated from a locomotive: *Denver Texas and Gulf R.R. Co. v. DeGraff* (1892), 2 Colo. App. 42 (2,000 acres of

native grass or pasturage); *Union Pacific R.W. Co. v. Tracy* (1894), 19 Colo. 331; *Union Pacific R.W. Co. v. Williams* (1893), 3 Colo. App. 526 (barn and contents). In this case the Court said: "In *Union Pacific R.W. Co. v. Arthur*, 2 Colo. App. 159 . . . the Court says, 'We are at a loss to see how the defence of contributory negligence can be invoked as a defence where there is no law requiring precautionary action on the part of the party damaged, and no question of negligence on the part of the corporation can be made or adjudicated.' Of course, if a party should knowingly or purposely place his property in a situation where sparks from a passing engine would be likely to ignite and burn it, he could not recover in case of its destruction. But such an act would scarcely come within the definition of contributory negligence; it would be a fraud from which its author would not be permitted to have an advantage."

South Carolina, Gen. Stat., sec. 1511: "Every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, or originating within the limits of the right of way of said road in consequence of the act of any of its authorized agents or employees, except in case where property shall have been placed on the right of way of such corporation unlawfully or without its consent, and shall have an insurable interest in the property upon its route, for which it may be held responsible, and may procure insurance thereon in its own behalf:" *Thompson v. Richmond and Daville R.R. Co.* (1885), 24 So. Car. 366 (cotton contained in a house of which plaintiff was tenant). The argument that the property for which the railway company should be held liable is that upon which they were authorized to effect insurance is noticed, but not decided, as it was considered that the property was insurable by the railway company: *McCandless v. Richmond, etc., R.R. Co.* (1892), 38 So. Car. 103 (wood, timber, etc.); *Hunter v. Columbia, etc., R.R. Co.* (1893), 41 So. Car. 86 (a gin house and contents).

Maine, Laws of, 1842, ch. 9, sec. 5: "When any injury is done to a building or other property of any person or corporation by

fire communicated by a locomotive engine of any railroad corporation, the said corporation shall be held responsible in damages to the person or corporation so injured . . .” In *Chapman v. Atlantic and St. Lawrence R.R. Co.* (1854), 37 Me. 92, an action for damages caused by the burning of cedar posts, the fire having been first communicated by the engine to certain combustible matter near the posts and then through this matter to the posts, the plaintiff had in the winter placed these cedar posts upon the land of another with his consent, some five or eight rods from the railroad track of the defendants. It was held that the plaintiff could not recover upon the ground that the right to insure was co-extensive with the liability of the railway company to insure. “To hold that the liability extends to those articles of movable property which have no established location, but may be deposited and removed with such facility as to render insurance impracticable and unavailing, would be unreasonable, as it would extend the liability of those corporations far beyond the means afforded for their protection. This manifestly is not the intention of the statute . . . In view of these considerations, the conclusion to which we have arrived is that the liability of railroad corporations under this statute extends only to property permanently existing along their-route, and capable of being insured, and that as to movable property, having no permanent location, the liability of such corporations is to be determined by the principles of the common law:” p. 96. It may be well to set out the statutory provisions as to insurance. It follows in the same sentence the extract from the statute above set out, and is divided but by a semi-colon: “and any railroad corporation shall have an insurable interest in the property for which it may be so held responsible in damages along its route, and may procure insurance therein in its own behalf.” In *Pratt v. Atlantic and St. Lawrence R.R. Co.* (1856), 42 Me. 579, it was (according to the head note) held that a railroad company is not liable for damages by fire from its engines to cedar posts deposited within a few rods of the track and intended for use in some other place within a short time. An examination of the case itself shews that the decision was as to standing timber, for

which it was held that the company would be responsible; the *Chapman* case is, however, cited apparently with approval. In *Lounney v. New Brunswick R.R. Co.* (1886), 78 Me. 479, it was held that a railway company is not liable for damages to a pile of sleepers deposited near its track caused by fire communicated from one of its locomotives; and that before the owner of such ties can recover he must prove that the fire was due to the negligence of the defendants. The sleepers had been deposited three years before the fire near "Shaw's barn," apparently on Shaw's land, and the fire had been first communicated to Shaw's barn and then to the sleepers. The Court held, following the *Chapman* and *Pratt* cases, p. 480: "The statute does not include movable articles that are only temporarily left near the track and are liable to be changed at any time:" *Bean v. Railroad* (1873), 63 Me. 293 (store and contents). In *Thatcher v. Maine Central R.R. Co.* (1893), 85 Me. 502, it was held that a railroad company is responsible for loss by fire of lumber piled in a permanent lumber yard near its track. The Court said, at p. 508: "We do not intend . . . to overrule any of the previous decisions of this Court . . . It cannot be properly said that the plaintiff's lumber, piled on his piling place, occupied by him in the prosecution of his business as a lumber manufacturer from year to year, in such quantities, was placed there for a temporary purpose only. It had the elements of permanency in its character; certainly as much so as the stock of manufactured chairs . . . or a stock of merchandise . . ."

It will be seen that no assistance is given by these cases in determining the meaning of the word "crops," nor indeed was it to be expected, as in none of these statutes was the word used.

Why the Parliament of Canada in passing such legislation saw fit to select certain kinds of property, and in consequence used the quoted word, must be a matter of conjecture. We must take the language as we find it, and apply the usual tests to determine the meaning. "Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the Legislature, it must be enforced, even though it be absurd or mischievous." *In re Hassard and City of Toronto* (1908), 16 O.L.R. 500, at p.

510: "It is the duty of a Court of justice not to make a statute or by-law reasonable, but to expound it as it stands according to the real meaning of the words used," etc., etc.

We must give effect to the meaning of the words used, not to the meaning which we may guess may have been intended.

If the word "crops" has only the one meaning, *cadit quæstio*. But this is not the case. The root meaning of the word is "something protruding:" see Century Dict., *sub voc.* "crop;" Kluge's Etymol. German Dict., *sub voc.* "Kropf;" but in ordinary parlance many meanings are attached to it, perhaps the most common being Nos. 2, 3, and 6 of the Century Dictionary:—

"2. Corn and other cultivated plants grown and garnered; the produce of the ground; harvest . . . in a more restricted sense, that which is cut, gathered or garnered from a single field, or of a particular kind of grain or fruit, or in a single season.

"3. Corn and other cultivated plants while growing; as . . . the crops are all backward this year;" (the word "cultivated" should be left out, no one but has heard and spoken of the hay crop while it was still growing, and it need not be cultivated hay or grass).

"6. Anything gathered when ready or in season, as the ice crop."

In the other lexicons and dictionaries which I have consulted much the same definitions are given. For example, in the Standard Dictionary:—

"1. The plants or grain collectively, that are cultivated for consumption; also the soil-products of a particular kind, place, or season; harvest.

"2. Anything gathered or stored at a proper time and for future use, as a crop of ice.

"3. A collection or quantity of things produced or grown, as a crop of lies. (Mrs. H. B. Stowe speaks of 'an abundant crop of noisy children.')

Murray's New English Dictionary:—

"8. The annual produce of plants cultivated or preserved for

food . . .; the produce of the land, either while growing or when gathered; harvest.

"9. The yield or produce of some particular cereal or other plant in a single season, or in a particular locality.

"(b) The annual or season's yield of any natural produce. In East Anglia we talk of crops of lambs, turkeys, geese, etc.," but this is, of course, dialectic, so a season's crop of logs, an annual ice crop.

Latham's English Dictionary:—

"1. Anything cut off.

"2. Harvest, corn gathered off a field; product of the field."

Wright's English Dialect Dictionary *sub voc.* "crop" gives the East Anglian use of the word referred to in Murray's.

Wharton's Law Lexicon, 10th ed.: "Crop, corn, hay, and such other produce as can be cut and stored up."

Black's Law Dictionary: "Crop. The products of the harvest in corn or grain. Emblements."

Kinney's Law Dictionary and Glossary: "Crop. That which is cropped, cut, or gathered; the valuable part of that which is planted in the earth, as grain, roots, etc."

Amer. & Eng. Encyc. of Law, 2nd ed., vol. 8, p. 302, *sub voc.* "Crops:" "The word 'crop' in its general signification means the product of cultivated plants while growing, or that product after it has been harvested or severed from the stock or root to which it was attached."

And in the cases:—

Goodrich v. Stevens (1871), 5 Lans. N.Y. 230: A crop is primarily some product of the soil gathered during a single year.

See *Mutual Fire Insurance Co. of Montgomery Co. v. Dehaven* (1886), 5 Atl. Rep. 65, 67: "Crops" is sufficient to include crops growing in the field.

In *State v. Crook* (1903), 132 N.C. 1053, "crops" include *fructus industriales* and *fructus naturales*.

In *Dana v. Lewis* (1853), 2 R.I. 492, 493, "crops" includes gathered as well as growing crops.

It will be seen that the word is used in a great variety of senses.

The defendants contend that, in the statute under consideration, a restricted meaning should be placed upon it.

It is admitted that the hay growing on the land, and even as severed from, but still being upon the land, will well come within the meaning of the word, but the *noscitur à sociis* principle is appealed to. "When two or more words susceptible of analogous meaning, are coupled together, *noscuntur à sociis*; they are understood to be used in their cognate sense. They take, as it were, their colour from each other; that is, the more general is restricted to a sense analogous to the less general." Maxwell on Statutes, 3rd ed., p. 461. Many illustrations of this principle are given in the authorities, shewing its application in determining the meaning of a word by reference to the context. And it is argued here that an examination of the other words in immediate connection with the word "crops" will shew that a restricted meaning must be given to the word in this statute. It is argued that the language being "crops, lands, fences, plantations, or buildings and their contents," all the rest of the words except, indeed, "their contents," refer to something of a permanently fixed nature, something not movable from place to place at will, something which cannot in the nature of things be got or kept out of the way of danger from fire from locomotives, and as to the contents it would be unreasonable to say that a building should be paid for and its contents not.

The principle appealed to does not go so far; it is but a particular case of "those principles which universally obtain that Courts of law and equity will, in construing a written instrument, endeavour to discover and give effect to the intention of the party, and, with a view to so doing, will examine carefully every portion of the instrument:" Broom's Legal Maxims, 7th ed., p. 435. See *supra*.

The application of this principle in most of the reported cases is made where a general word or phrase, following an enumeration of more particular words or phrases, the well-known "*ejusdem generis*" cases, or where a word

of large meaning precedes words of more restricted meaning, and is by the effect of such later words considered to be limited in its meaning and application. Instances of the former are frequent and well known, and perhaps the growth or extension of the doctrine has received a check by such cases as *Anderson v. Anderson*, [1895] 1 Q.B. 749,—and see *Powell v. Kempton Park Racecourse Co.*, [1899] A.C. 143. The latter aspect of the rule is exhibited in such cases as *Kearns v. Cordwainers' Co.* (1859), 6 C.B.N.S. 388, in which the words following came up for consideration: "None of the powers by this Act conferred . . . shall extend to take away, alter or abridge any right, claim, privilege, franchise, exemption or immunity to which any owners or occupiers of any lands . . . on the banks of the river . . . are now by law entitled . . ." It was held that the rights and claims saved were simply those of such owners or occupiers as such owners or occupiers, not such as they might have as members of the general public. So, also, in *Shuttleworth v. LeFleming* (1865), 19 C.B.N.S. 687, the words were, "right of common or other profit or benefit to be taken and enjoyed from or upon any lands." It was argued that the general phrase "right of common" included—as no doubt it is wide enough to do—a right of common in gross, but the Court of Common Bench held, from a consideration of the remainder of the statute, that such meaning was in this statute (2 & 3 Wm. IV. (Imp.) ch. 71) excluded; and that only those usual rights of common and profits *à prendre* which are in some way appurtenant to the land and limited to the wants of the dominant tenement are included. Cf. *Mounsey v. Ismay* (1865), 3 H. & C. 486; *Webb v. Bird* (1861), 10 C.B.N.S. 268. In *Regina v. Sanders* (1839), 9 C. & P. 79, the statute against breaking into shops (7 & 8 Geo. IV. ch. 29, sec. 15) was under consideration. That statute provided, "that if any person shall break and enter any shop, warehouse, or counting house, and steal any chattel, etc.," he should be liable to be transported for life. The prosecutor sold coal, and was also a blacksmith; the place from which the coal was stolen was alleged to be a shop to which persons went who bought it, this shop being a room behind the blacksmith shop. Alderson, B., said: "To come

within the provision of these Acts of Parliament, the place must be more than a mere workshop, it must be a shop for the sale of articles; a workshop, such as a mere carpenter's shop or a blacksmith's shop, would not, I think, be within the Acts." So the wages of a collier are not within the meaning of the words "salary or income" in sec. 53 of the Bankruptcy Act of 1883, as they are not "income" *ejusdem generis*, with salary: *In re Jones, Ex p. Lloyd*, [1891] 2 Q.B. 231.

I do not cite any further cases, though I have read all those referred to in Broom, Maxwell, and Hardcastle. I do not find any case quite in point. It seems to me that the argument based upon this principle is not well founded. The section cannot have been intended to give the word "crop" the single meaning of "growing crop," "crops in and attached to the freehold." The word "land" would cover this meaning if used alone, as indeed the word would, used alone, cover fences, plantations, buildings. There would be no object in using the word "crops" at all if nothing more was meant than "growing crops." But once the crop is severed (and, as has been said, it is admitted that the word in the statute covers it in its severed state), at what stage does the chattel cease to be "crops?" Not when shocked up in stacks or shocks. It surely would be absurd that wheat lying on the ground in sheaves as it comes from the binder should lose its protection and statutory name when it was shocked, or when made into a stack in the field, or when threshed, say in the field. I can understand and follow an argument that so far the wheat is "crops," but that when drawn away from the land which produces it, it should cease to be within the meaning of the statute and then be brought within the category of ordinary chattels. It may well be asked why a load of wheat being drawn to market or standing at the door of a warehouse should be protected if a load of flour from a miller or a load of cloth from a weaver is not. But it may be replied, "why should wheat growing in or piled on a farm be protected, and the cow or horse feeding in it, not?" The Parliament of Canada have abandoned, or it would be better to say have not adopted, the broad language of the statute in the States of the American Union. "Property,"

as such, is not protected, but only certain particular and particularized kinds of property. These particular kinds of property are selected for special treatment, and, whatever anomalies result, we must interpret the words used in describing such kinds of property by the ordinary rules of interpretation. The fact that an interpretation in any given sense of the statute would lead to anomalies does not assist or tell against such interpretation—the statute is itself anomalous.

A farmer is reaping his field of wheat with a binder drawn by two horses; he has left his coat with his purse in the pocket hanging upon a tree in the plantation in the corner of the wheat field; his other farm stock and implements are at the farmstead; some colts and calves tethered within the stable and byre, some with their dams running free in the barnyard. He has bought a quantity of lumber to build fences; some of this is lying in the barn, some yet by the roadside piled up, and some already made into fences. A fire starts from a passing locomotive in the overripe grain, spreads so quickly that there is no time even to save the coat and pocket-book; the horses drawing the reaper are scorched and perhaps blinded by the sparks and cinders, the reaper injured or reduced to scrap iron, the barn and outbuildings take fire and are destroyed, the animals in the barnyard are injured or killed, the fences are burned as well as the lumber on the side of the road. No negligence can be proved against the railway company. What follows?

The wheat is a "crop," it must be paid for; the trees in the corner are a plantation, they must be paid for; the barn and outbuildings must be paid for, they are buildings; fence material within the building must be paid for, that is "contents;" so also the colts and calves within; the fences burned must be paid for. But, while the wheat must be paid for, not so the reaper or the horses engaged in cutting. They are not crops. The trees in the plantation must be paid for, but not the coat hanging on it; the colts and calves in the building, but not those in the barnyard; the fence *in situ* and the fence material in the barn, but not that on the roadside; while, if the farmer himself suffer personal injury he cannot recover; and if he die, his widow has no relief—at least financially from the company.

Again, a shopkeeper has received his winter goods at the station. Much of these he has got into his shop; some are still lying in his yard, and some are upon his drays, but not unloaded. Of his winter fuel, some he has in his basement, but some of his cordwood is still in the street and some of his coal in his yard. A fire takes place from the sparks from a locomotive, without negligence proved. What follows? His shop and the goods therein, including fuel, must be paid for, but the goods in the yard and those on the drays, the drays themselves and the horses, the wood and coal without, the railway escapes liability for. And, as before, he can recover nothing for personal damage to himself or his family. And why? Because Parliament so wills. We cannot here go behind the will of Parliament and ask, "Why did Parliament so will?" *Sic volo, sic jubeo.*

"Crops," then, being selected as one of such favoured classes of property, and the word clearly not being restricted in meaning to "growing crops," we need not fear to apply the word whenever it is fairly applicable, and not be deterred either by fear of anomaly or apparent absurdity arising from treating one species of property differently from another.

It seems to me that a crop of wheat does not lose its character of "crops" at least until it has passed out of the ownership of the grower, or has been converted into something else, such as flour; and that whether the wheat remain on the land or farm where grown, or be in the process of removal, or have been removed. A crop of hay does not cease to be "crops" at least until the hay leaves the ownership of the grower, or be changed into something else, whether that be the filling of a mattress, or what not. It may well be that *quoad* the miller or other purchaser, the wheat is not "crops;" as regards the mattress maker or other purchaser the hay is not "crops;" but in either case, mere articles of commerce not considered by Parliament necessary to be protected unless within a building. But I cannot see that, as to the grower at least, wheat or hay loses its property as "crops" so long as he owns it and it remains in substance unchanged.

And, after all, in all cases of interpretation of ambiguous

statutes, the balance of hardship or inconvenience must be considered; if upon one construction the balance of hardship or inconvenience would be strongly against the person whose property is to be protected, then that interpretation should not be adopted if at all to be avoided: see *per* Lord Selborne, L.C., in *Dixon v. Caledonian and Glasgow and South Western R.W. Cos.* (1880), 5 App. Cas. 820, at p. 827. Just consider the relative situation of railway company and grower of farm products. The railway company run the line where they will; they use engines filled with fire—to the advantage of the public, it is true, but for the advantage of the company primarily and ultimately. If a fire take place without negligence there are two innocent parties, of whom one must suffer. It is elementary equity that, of two innocent parties, he should suffer who, however innocently, brought about the loss. Why should not the railway company suffer the loss? The only reason (before the statute) was that the Courts had laid it down as a principle of law that, unless negligence could be proved against the railway company, they escaped—the other innocent party, who had nothing to do with the cause of the loss, and who made nothing by the use of the dangerous element, had to bear the loss without redress. From day to day he could contemplate a railway company making money by the use of a dangerous machine, and know that he could do nothing to prevent such use, but that if any damage were caused to him—if he were ruined by this machine, the railway company could legally disregard his claim for compensation. And all that is so yet, except as to the specially mentioned kinds of property, a state of affairs which, it may be, calls for parliamentary interference. That is, of course, for Parliament to decide, not for the Courts.

But as to the kinds of property which Parliament has taken under its protection, I venture to think that, the rule of law referred to having been got rid of, there is no reason for relaxing the salutary principle—that he who, voluntarily or involuntarily, does the act occasioning damage, must suffer rather than the innocent party, who, not participating, has been injured by such act.

The balance of convenience, in my view, enormously preponder-

ates in favour of the innocent injured. I had almost said that common justice and fair play demanded such a conclusion. The rule in the civil law is in that sense; and the state of the authorities before the *Vaughan* case was such as (*me judice*) would have justified a conclusion in the same direction. However that may be, the doctrine there laid down is too well established to be questioned in this Court. And so in respect of all else than the specified kinds of property, the innocent party who receives no advantage from the engine which sends out fire must bear his loss without redress against those who use and profit by the engine.

I am of opinion, from a consideration of the statute, that the definition of the word "crops" in the statute must be at least as wide as the following: "Vegetable productions, whether annual or more frequent, not altered in substance and still owned by the owner or occupant of the land producing them." This would include *fructus naturales* as well as *fructus industriales*, hay and grass as well as wheat and potatoes; it would include apples and exclude apple trees, include currants and exclude currant bushes, include strawberries and exclude strawberry plants, include all kinds of grain and exclude an ice crop, the crop of lambs of Norfolkshire and Mrs. Beecher Stowe's crop of noisy children.

I am therefore of opinion that the first ground failed.

Nor am I able to give effect to the second argument.

I adopt the reasoning of the Connecticut Court in *Grissell's* case and of the Missouri Court in the *Campbell* and *Adams* cases, and do not think that the earlier Maine decisions are to be followed.

But I am unable to see how it can be said that such property is not insurable by the railway company—there need be no more difficulty in such insurance than any other general insurance. Such insurance, as it is well known, is effected by railway companies upon the contents of their freight sheds, which change from time to time, or such general insurance as was in question in *Canadian Pacific R.W. Co. v. Ottawa Fire Insurance Co.* (1906-1907), 39 S.C.R. 405, 11 O.L.R. 465, 9 O.L.R. 493.

There is nothing which can be called contributory negligence here. In that respect I adopt the language of the Colorado Court

in the *Williams* case, 3 Colo. App. 526. See also *Derinzy v Corporation of Ottawa* (1887), 15 A.R. 712, at p. 717, *per* Hagarty, C.J.O.: "Nor can I accede to the argument that the plaintiff can be barred by his voluntarily coming to reside and build a greenhouse, etc., on land known to be previously liable to be flooded."

Upon all grounds taken, the appeal should be dismissed, and with costs.

FALCONBRIDGE, C.J., and BRITTON, J., concurred.

The defendants by leave appealed to the Court of Appeal, and the appeal was argued on February 1st, 1909, before Moss, C.J.O., and OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

D. L. McCarthy, K.C., and *W. E. Gundy*, for the defendants, appellants, stated that this was the first case on the point involved of the construction of sec. 298 of the Railway Act, R.S.C. 1906, ch. 37, and contended that by including "crops" in that section, the intention was to benefit the farmer; the "crops" must mean something growing on the land or on the adjoining land; that no insurance company would or could cover a case of this kind where the "crop" is brought from a distance; that the case of *Grissell v. Housatonic R. Co.*, 9 Atl. Rep. 137, 54 Conn. 447, supports the view that the word "crops" should be read in connection with the accompanying words, "lands, fences, plantations, or buildings;" that when removed from the land where it was grown the hay ceased to be a crop within the meaning of the section, the intention being to benefit farmers, not to benefit people bringing the dangerous material up to the railway line. They also referred to *Broom's Legal Maxims*, 6th ed., p. 543; and *Murray's Oxford Dictionary*, *sub voc.* "crops."

A. B. Carscallen, for the respondent, referred to the definition of crops in the *Standard Dictionary* and in *Webster's Dictionary* as shewing that it applied to the product of the soil even after removal; that no doubt the crop here would have ceased to be a crop when it was being used as fodder or when it had become a mattress, but that mere removal could not be the test. He re-

ferred to the American and English Encyc. of Law, 2nd ed., vol. 13, p. 430, under the title "fires;" *Dawson v. Midland R.W. Co.* (1872), L.R. 8 Ex. 8; *Canadian Pacific R.W. Co. v. Ottawa Fire Insurance Co.*, 11 O.L.R. 465, 39 S.C.R. 405.

McCarthy, in reply, contended that "crop" in its ordinary acceptation meant crop on the farm; that when it had left the farm and become merchandise it ceased to be crop; that the section in question does not contain the word "property," which is found in some American statutes; and that the only case in which movable property would be covered by the section would be if a crop were put into a building, and the defendants rendered liable under the word "contents" in the section.

April 5, 1909. GARROW, J.A.:—Appeal by the defendants from a judgment of a Divisional Court affirming the judgment at the trial of Teetzel, J., in favour of the plaintiff.

The only point involved is the proper construction of sec. 298 of the Railway Act, R.S.C. 1906, ch. 37, which says that when damage is caused to "crops," lands, fences, plantations, or buildings and their contents, by a fire, started by a railway locomotive, the company making use of such locomotive, whether guilty of negligence or not, shall be liable for such damage.

On March 9th, 1908, a quantity of hay or marsh grass, as it is called, belonging to the plaintiff, was destroyed by fire which escaped from a locomotive engine then being used by the defendants in the yards of the Wallaceburg Sugar Co. The hay was grown on lands in the township of Dover, at some distance from the line of railway—exactly how far is not stated, but it was certainly off the line of railway, and far enough away to have made it impossible that fire from a locomotive engine could have directly reached it there. The plaintiff had sold the hay, and had, for shipping purposes, teamed and placed it alongside the defendants' railway track, where, in the ordinary course of business, the defendants' locomotive engine was shunting when the fire occurred. Negligence is not alleged.

Teetzel, J., construed the statute as applicable to "crops"

generally, wherever grown, if consumed by fire escaping from a locomotive engine. And this construction, after much examination of American authorities, was adopted by the Divisional Court, a conclusion with which I find it quite impossible to agree.

The question, of course, is what did Parliament intend by the language used? Did it intend to cast upon the steam railways of the country the burden of insurers against fire of everything movable which by the dictionary is called a "crop," no matter where grown, whether in Canada or elsewhere, which the owner for his own convenience chooses, without the knowledge or consent of the railway, to place upon anybody's land within the danger zone? Or did it mean to protect the husbandman in the use and cultivation of his lands lying along the route of the railway, from the inevitable danger to his "crops, lands, fences, plantations, or buildings and their contents," from escaping sparks, which risk, since the decision in *Vaughan v. Taff Vale R.W. Co.*, 5 H. & N. 679, he was compelled to bear without redress unless he could prove negligence?

Surely the latter was the plain and obvious intention. It was not the intention to cover all property, but only the property expressly enumerated, all of which, unless it be "crops," has the quality of fixity, or attachment to the land along the route of the railway.

No reason is suggested, and none occurs to me, why "crops" in general, and apart from the place where they were grown, should enjoy a special protection not afforded to other inflammable property. But there is, I think, good reason why "crops" grown on land upon and along the route of a railway, and therefore in constant danger from its operation, should while growing, and even when grown and reaped, while still on the land, be protected, at least to the same extent as the other named property, such as fences, plantations, buildings, etc. They are all, I think, in precisely the same category, and the maxim *noscitur à sociis* clearly applies.

The statute does more than merely enumerate the kinds of property intended to be protected, for it gives to the railway company an insurable interest in the property for which under the

statute it is made responsible. And upon the question of intention this is, I think, of considerable importance, because it was clearly intended that the whole risk might be insured against, and it is, therefore, quite legitimate to consider the matter from the insurance standpoint in a search for the true intention, always, of course, having regard to the language of the statute. Insurance, to be useful, must, it is needless to say, be made in advance of the loss. The subject matter need not, it is true, be fixed property, for movable property may be, and constantly is, insured, although usually, I think, affixed by description as at some particular place, or else in transit. The description of the property to be insured—that is, where it is and what it is—is the basis upon which the premium is calculated and the contract made. Chattels described as at a particular locality would cease to be covered on removal elsewhere: see *Pearson v. Commercial Union Assurance Co.* (1876), 1 App. Cas. 498, because, as pointed out by Lord Chelmsford at p. 505, “an insurance against fire necessarily has regard to the locality of the subject matter of the policy, the risk being probably different according to the place where the subject matter of the insurance happens to be.” A crop grown on lands along the route of the railway would certainly cease to be covered if removed to a place beyond the route of the railway. And, conversely, after the contract was made, and except upon consent or by virtue of special terms in the contract, the risk could not be materially increased by the assured bringing into the territory or place intended to be covered a crop not grown there. And if the assured might not so increase the risk, there would be still less justification for permitting, or for supposing that Parliament intended to permit, a third person, not a party to the agreement at all, to do so. Any other construction would lead to extraordinary results. A farmer having a farm miles away from the railway might rent an acre of land on a railway siding in the village, and team and stack there ready for shipment a thousand dollars’ worth of hay, which, without expense or trouble to him, would be practically insured for as long as he chose to leave it there. And, if not consumed, he might ship it by the railway to a distant city, for sale, and again unloading

it near the track obtain the same ample protection. For, by the conclusion arrived at in the Courts below, as long as the article can be called a crop, and however often it may be moved from place to place, and however far it may travel in Canada, it will always, when and as often as it is placed along the route of a railway, be automatically protected by the statute, a result which, in my opinion, was never intended, and to which the language in no way compels. The language may not be as clear and distinct as it could be made, but, having regard to what was the law before the change, to the evil intended to be remedied, and to the language actually used for the purpose, and reading the whole section together, as of course should be done, I cannot say that I have any doubt that the real intention, and the proper construction, is the limited one which I have pointed out; in other words and to repeat, that "crops" means crops grown or growing upon lands upon and along the route of the railway, and actually situated upon such lands when destroyed. The change was clearly made for the benefit of the owner of such lands in respect of his crops growing or grown upon such lands, and not for the benefit or protection of any one else who might happen to own crops grown outside but brought within the protected territory.

For these reasons I think the appeal should be allowed, upon the terms contained in the order granting leave to appeal, namely, that the defendants shall bear their own costs of the appeal and shall also pay the costs of the respondent. And the action must be dismissed with costs, including the costs of the motion before the Divisional Court.

MOSS, C.J.O., OSLER and MACLAREN, JJ.A., concurred.

MEREDITH, J.A.:—In seeking, in such a case as this, the true meaning of a word so well known, and of such wide and varied use—and probably abuse—as that in question, the most useful dictionary is, perhaps, the enactment in which it is used, aided by a knowledge of what the law was before the introduction of the clauses in question, and the mischief which the introduction of them was intended to remedy.

Prior to such introduction, railway companies were, very reasonably, held liable for injury caused by fire from their locomotive engines, when they were guilty of some negligence which caused the injury, and such liability still continues. But the difficulty of proving such negligence was sometimes great, and probably sometimes impossible, and a demand for a parliamentary extension of such liability was met by the enactment in question.

The plain effect of the legislation is to make railway companies liable for injury so caused, whether there is or is not negligence on their part; but that liability is plainly restricted to certain persons and certain classes of property. As to such it does away with the need of proof of negligence, and, in effect, puts the parties in the same position as if proof of the cause of the injury were indisputable proof of negligence; it does not make a contract of insurance between such owners of such property and the company.

The classes of property to which it is confined are "crops, lands, fences, plantations, or buildings and their contents." The persons who were in the contemplation of Parliament were the owners of property along the line or tracks of the railways, whose property might be endangered by the running of such engines. This is made very plain by the clause giving the companies an insurable interest in "such property upon or along the route."

The "marsh grass" in question was grown, harvested, and baled, many miles away from the railway, and could not during any of these processes have been deemed within the provisions of the enactment, it was so absolutely and entirely without the danger zone, and so far removed from the "route" of the railway.

The question, then, is: did it acquire the character of "crops," within the meaning of the enactment, by reason of the owner bringing it to the "route," and within the zone of danger, for the sole purpose of delivering it to a purchaser to whom it had been sold? I cannot think that it did. I cannot think that the plaintiff was one of those owners for whose benefit the enactment was passed, nor can I think that a crop which has been converted into a well-known article of merchandise—baled, dried swamp-grass for mattresses—and already sold as such, and transported many miles

on its way to the purchaser, can be considered to be within the meaning of the words, "crops, lands, fences, plantations, or buildings and their contents," unless contained in a building, which it was not.

In the absence, then, of proof of negligence, the defendants cannot be held liable; and no claim based upon negligence was made, but, on the contrary, any such claim was plainly repudiated by the plaintiff at the trial.

Having reached this conclusion on this branch of the case, it is not necessary to express any opinion upon the question of contributory negligence, or any like defence.

I would allow the appeal and dismiss the action.*

* See now 8 & 9 Edw. VII. ch. 9, sec. 9 (D.):—Sub-section 1 of section 298 of the said (the Railway) Act is amended by striking out the words "crops, lands, fences, plantations, or buildings and their contents," in the first and second lines thereof, and substituting therefor the words "any property," and by inserting after the word "recoverable," in the 9th line thereof, the words "under this section." Provided further that the company shall, to the extent of the compensation recoverable, be entitled to the benefit of any insurance effected upon the property by the owner thereof. Such insurance shall, if paid before the amount of compensation has been determined, be deducted therefrom; if not so paid, the policy or policies shall be assigned to the company, and the company may maintain an action thereon.

CARRIERS OF GOODS—BREACH OF CONTRACT.

ONTARIO.]

[LATCHFORD, J.

TOLMIE V. MICHIGAN CENTRAL R.W. CO.

(19 O.L.R. 26.)

Railway—Carriers of Goods—Bill of Lading—Delivery of Goods without Surrender of—Condition—Claim for Loss—Time—Breach of Contract—Quantity—"More or Less."

A bill of lading of the defendants, covering wheat shipped, provided that its surrender should be required before delivery of the wheat, and that claims for loss or damage must be made in writing to the defendants' agent at point of delivery promptly after arrival of the wheat, and if delayed for more than thirty days after such delivery, or after due time for delivery, the defendants should not be liable in any event:—

Held, that the failure to make such claim in writing within the time specified did not relieve the defendants from liability resulting from breach, not of their contract of affreightment, but of their contract to deliver the wheat to the holder of the bill of lading and to no one else.

Where, therefore, the defendants had delivered the wheat without obtaining surrender of the bill of lading:—

Held, that the defendants were liable to the consignor to the value of the number of bushels of wheat expressed in the bill of lading to have been received by them, but not for any more, although more had been actually shipped, and the words "more or less" in the bill of lading did not, in the circumstances, affect the matter.

Mercer v. Canadian Pacific R.W. Co. (1908), 17 O.L.R. 585, distinguished.

THIS was an action tried by LATCHFORD, J., without a jury, at St. Thomas, on April 14th, 1909.

The facts of the case are stated in the judgment.

J. M. Glenn, K.C., for the plaintiff.

D. W. Saunders, K.C., and *W. B. Kingsmill*, for the defendants, cited *Mercer v. Canadian Pacific R.W. Co.* (1908), 17 O.L.R. 585, and the cases therein referred to.

May 14, 1909. LATCHFORD, J.:—On November 19th, 1907, the plaintiff, a grain merchant at Rodney, shipped a car of wheat from that village by the defendants' railway, consigned to the Traders Bank at Dutton, for one Hollingshead. A bill of lading was delivered to the plaintiff by the defendants' agent at Rodney. It is admitted that the form of the bill of lading has been approved of by the Board of Railway Commissioners for Canada. The plaintiff placed the bill of lading in the agency of the Traders Bank at Rodney, attaching thereto a draft at ten days upon Hollingshead for \$1,058.72, being the price of the 1,102 bushels, 50 pounds of wheat shipped, at 96 cents per bushel. The car was, however, billed as containing but 900 bushels, more or less, and the bill of lading covers only that quantity. The bank at Rodney immediately credited Tolmie's account with the amount of the draft, less exchange, and sent the draft and bill of lading to its agency at Dutton, where in the ordinary course of business Hollingshead was to accept and pay the draft, take up the bill of lading, and obtain delivery of the wheat. The bill of lading was indorsed as follows: "On payment of freight and all charges deliver to the order of

Traders Bank, Dutton. (Signed) The Traders Bank of Canada, Rodney, without recourse, A. S. Winslow, manager." Hollingshead accepted the draft, but did not pay it and take up the bill of lading. Owing to some mistake on the part of the defendants' agent at Dutton, or to collusion between the agent and Hollingshead, the car of wheat was delivered, not to the Traders Bank or its order, but to Hollingshead.

In March, 1908, more than three months after the shipment, Tolmie learned for the first time that the car of wheat in question and another car, shipped and drawn against in the same manner, had been delivered to Hollingshead by the defendants. Hollingshead was not required in either case to produce the bills of lading to the defendants. The matter came to the plaintiff's knowledge by the bank charging back to him the amounts of the two drafts, which the bank had in the usual way discounted against the bills of lading. Tolmie went promptly to Dutton and saw there the agent of the bank, the agent of the defendants, and Hollingshead. No explanation was given him as to how the defendants had delivered the wheat without calling for the production of the bills of lading, nor was any explanation forthcoming at the trial. Some arrangement was made early in March, and the value of one of the cars, \$870, was paid by Hollingshead in three or four instalments between March 3rd and March 12th. But the car now in question was not paid for. On March 30th Hollingshead made an assignment for the benefit of his creditors. The plaintiff filed no claim with the assignee. No written notice of his loss was given by the plaintiff to the defendants until his solicitor wrote them on April 18th, 1908, that he was instructed to enter suit.

The defendants admit the delivery of the wheat to Hollingshead in breach of their contract with the plaintiff to deliver it to the Traders Bank, but say they are freed from any liability by condition 3 indorsed on the bill of lading, and forming part of their contract with the plaintiff, and that, even if they are not so released, they are relieved from responsibility owing to the negligence of the plaintiff and the plaintiff's agents, the bank, in not sooner notifying him that his draft had not been paid. In any event they say they

should not be held liable for more than the value of the grain stated on the face of the bill to have been shipped by the plaintiff.

The bill of lading bears upon its face, largely in capital letters, the following clause: "If the word 'order' is written immediately before or after the name of the party to whose order the property is consigned, *the surrender of this original bill of lading, properly indorsed, shall be required before the delivery of the property at destination*, as provided by section 9 of the conditions on the back hereof." Section 9 of the conditions repeats this provision, with a modification that is not material in the present case. The word "order" is written immediately before "Traders Bank, Dutton," the party to whose order the property was consigned. The defendants admittedly did not require before the delivery of the property at its destination the surrender of the original bill of lading, and the plaintiff lost the value of the wheat shipped.

Condition 3, on which the defendants rely, is as follows: "No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee. The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation. Claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than thirty days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event. Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property."

The effect of a condition regarding notice was recently considered in *Mercer v. Canadian Pacific R.W. Co.*, 17 O.L.R. 585. It was there held, following *McMillan v. Grand Trunk R.W. Co.* (1888), 16

S.C.R. 543, that where loss was sustained owing to the negligence of the defendants, they were relieved by the condition from liability when claim for loss was not made in writing within the time limited by the condition.

When notice is not given in conformity with a condition like condition 3, approved by the Board of Railway Commissioners for Canada, a carrier is, upon the authority of the cases referred to, relieved from all liability arising from loss or damage sustained in transit, or at point of delivery. But the liability for loss or damage from which they are so relieved cannot, I think, be extended to the liability resulting from breach, not of their contract of affreightment, but of their contract to deliver the property carried to the holder of the bill of lading, and to no one else. The delivery by the defendants of the wheat to Hollingshead without the production and surrender of the bill of lading was a flagrant breach of their contract with the plaintiff, clearly and prominently expressed on the face of the bill of lading. The condition pleaded in avoidance of their contract applies only, in my opinion, to such loss or damage as is mentioned in *Mercer v. Canadian Pacific R.W. Co.*, and the cases there cited, and not to a violation by a carrier of his contract to deliver the goods carried only to the consignee, and then only upon surrender of the proper evidence of ownership.

Upon becoming aware of the breach, the plaintiff acted promptly and reasonably. The defendants had knowledge, through their agent at Dutton, of his efforts to obtain payment for both cars of wheat. It is not suggested that the plaintiff could have done more to that end than he was successful in doing. Nor was there, I think, any laches on the part of the Traders Bank. The agency at Rodney must have assumed from the ordinary course of business that the wheat would not be delivered unless the bill of lading was taken up by payment of the draft attached, and the agency at Dutton no doubt considered that the defendants would comply with the contract and not deliver the wheat except to the order of the indorsee. The bank appears to have acted as soon as the delivery to Hollingshead became known to it; and the defendants cannot, I think, escape responsibility by reason of any delay on the part of either agency of the Traders Bank.

I consider the defendants liable, but only for the value of the 900 bushels expressed to have been received by them for carriage and delivery. The words "more or less" should not in the circumstances be held to affect the quantity. The plaintiff or his shipper knew that the quantity of wheat shipped was 202 bushels in excess of the quantity mentioned in the bill of lading. "Under-billing," as it is called, may be a common custom among grain shippers, and carriers protect themselves against it by making the quantity expressed subject to ascertainment. But the practice is reprehensible and dishonest.

The plaintiff is entitled to recover for but 900 of the 1,102 bushels shipped. There will be judgment in his favour for \$864, with interest from December 2nd, 1908, and costs.

EXPROPRIATION.

ALBERTA.]

[SUPREME COURT.

MARSAN V. GRAND TRUNK PACIFIC R.W. CO.

(2 Alta. L.R. 43.)

The Railway Act, secs. 158, 177, 217, 220—Expropriation of lands—Requirements of plans, profiles and books of reference—Injunction—Undertaking of railway company to comply with Act—Plan filed of land subsequently sub-divided—Practice—Appeal—Judgment of a persona designata—Stated case—Admissions of counsel in stated case, effect of.

While a substantial compliance only is needed with the provisions of sec. 158 of the Railway Act with respect to plans, profiles and books of reference to be filed prior to expropriation proceedings being taken, it must clearly appear from the plans, profiles and books of reference filed, exactly what portion of the land of each separate owner the railway company requires, and the mere indication of the centre line of the proposed railway is not sufficient; the book of reference is a necessary part of the filings to substantially comply with the provisions; if the first definite information of the owner as to the quantity of land to be taken is obtainable only from the notice served, there has not been substantial compliance with the Act.

In the absence of evidence that the company has been oppressive or high-handed, an injunction will not be granted to restrain the railway company from proceeding with the railway, even if there has not been substantial compliance with the Act, provided the railway company will enter into an undertaking to comply forthwith with the requirements of the Act and to facilitate the proceedings for determining the amount of compensation to be paid—following *Corporation of Parkdale v. West*, L.R. 12 A.C. 602, 56 L.J.P.C. 66, 57 L.T. 602, and *Hendrie v. Toronto, Hamilton and Buffalo Ry. Co.*, 26 O.R. 607, affirmed 27 O.R. 46.

But the Court will reserve to the plaintiff the right to apply to a single Judge for an injunction to prevent any unnecessary delay in proceeding to comply with the Act and pay compensation.

Warrants of possession improperly granted to a railway company which has not complied with the provisions of the Act will not prevent or render invalid the registration of a plan sub-dividing the lands required by the railway company, but,

Held, that in the absence of acceptance by the municipality of the streets, and evidence of a user of the streets by the public, or of evidence of the sale of lands in the sub-division, the streets shewn on the plan do not become highways.

Quære, per STUART, J.—Whether or not the judgment of a Judge who is *persona designata* is appealable in view of the decision in *C.P.R. v. Little Seminary of Ste. Therese*, 16 S.C.R. 606, since the enactment of sec. 220 of the Railway Act.

Quære, per STUART, J.—Whether or not a dissatisfied litigant who has the right to appeal must appeal and is not at liberty to bring the same matter before the Court in a different way, but—

Held, that where the right of appeal was doubtful and the plaintiff had given notice of appeal, and at the same time brought an action for injunction, in which action the validity of the order appealed from would have to be inquired into, the matter was properly before the Court.

Held, also, that the Court will not be bound by agreements of counsel in a stated case as to the effect upon the rights of parties to the action by determination of certain questions submitted in certain specified ways.

Sections 158 and 177 of the Railway Act, ch. 37, R.S.C., read as follows:—

158. Upon compliance with the provisions of the last preceding section, the company shall make a plan, profile and book of reference of the railway.

2. The plan shall shew,—

- (a) the right of way, with lengths of sections in miles;
- (b) the names of terminal points;
- (c) the station grounds;
- (d) the property lines and owners' names;
- (e) the areas and length and width of lands proposed to be taken, in figures, stating every change of width;
- (f) the bearings; and
- (g) all open drains, watercourses, highways and railways proposed to be crossed or affected.

3. The profile shall shew the grades, curves, highway and railway crossings, open drains and watercourses.

4. The book of reference shall describe the portion of land proposed to be taken in each lot to be traversed, giving numbers of the lots, and the area, length and width of the portion of each lot proposed to be taken, and names of owners and occupiers, so far as they can be ascertained.

5. The Board may require any additional information for the proper understanding of the plan and profile.

6. The plan, profile and book of reference may be of a section or sections of the railway.

7. In the Province of Quebec the portion of the railway comprised in each municipality shall be indicated on the plan, and in the book of reference, by separate number or numbers. 3 Edw. VII. ch. 58, sec. 122.

177. The lands which may be taken without the consent of the owner shall not exceed,—

- (a) for the right of way, one hundred feet in breadth, except in places where the rail level is or is proposed to be more than five feet, above

or below the surface of the adjacent lands, when such additional width may be taken as shall suffice to accommodate the slope and side ditches;

(b) for stations, depots and yards, with the freight sheds, warehouses, wharfs, elevators and other structures for the accommodation of traffic incidental thereto, one mile in length by five hundred feet in breadth, including the width of the right of way. 3 Edw. VII. ch. 58, sec. 138.

Two appeals consolidated by order of Mr. Justice Beck; the one from an order of Mr. Justice Beck dated 22nd of October, 1908, made in pursuance of the provisions of sec. 217 of the Railway Act, ch. 37, R.S.C. (1906), whereby he directed warrants of possession to issue in favour of the defendant company in respect to certain portions of the plaintiff's property; the second from the judgment of the Chief Justice in favour of the defendant company, delivered on the 27th of November, 1908, after the argument of a case stated by the parties, wherein the questions submitted were, in general, whether or not the defendant company had complied with the provisions of the Railway Act in respect to the filing of plans, profiles and books of reference, and also in other respects, so as to authorize them to expropriate and take possession of certain lands of the plaintiff.

Both the Chief Justice and Mr. Justice Beck felt that in the circumstances they should not take part, and, Mr. Justice Scott being through illness unable to take part, it became necessary to resort to the provisions of sec. 34 of the Supreme Court, ch. 3 of the Acts of Alberta, 1907, and a special order was accordingly made that the Court for the purpose of these appeals should be composed of two Judges only.

The facts and points of dispute appear sufficiently from the judgment.

The appeals were heard by Harvey and Stuart, JJ., at Edmonton, on March 3rd and 4th, 1909.

Edwards, K.C., for appellant (plaintiff) :—The appeal from the judgment of the Hon. Mr. Justice Beck directing warrants to issue for possession, is taken formally in consequence of the

objection of counsel for the defendant that the plaintiff's remedy, if any, is by way of appeal under section 220 of the Railway Act.

The company has not complied with the provisions of the Railway Act as to the deposit of plan and book of reference, and in consequence it is not authorized to commence the construction of the railway or to exercise the compulsory powers of the Act: *Parkdale v. West*, L.R. 12 A.C. 602, 56 L.J.P.C. 66, 57 L.T. 602, see pp. 611, 612 of L.R.; *Kingston & Pembroke Railway Co. v. Murphy*, 17 S.C.R. 582, see pp. 586, 590 and 593, see in same case, 11 O.R. 582, at p. 586; *Brooke v. Toronto Belt Line Railway Co.*, 21 O.R. 401; *Grand Junction Railway v. Peterboro*, L.R. 13 A.C. 136, at p. 144.

The amendment of the Railway Act in 1903 as carried into section 158 of the Revised Act introduced particulars to be shewn upon the plan and book of reference which were not required under the earlier Act. There has been no attempt to comply with the requirements of this in the amendment. The owner of the property is entitled to know definitely what land is proposed to be taken. The plan deposited shews an intention to take over 500 feet in width, while the order of the Board authorizing the construction of the branch line only authorizes 100 feet in width for the right-of-way and 500 feet for station, etc. It could not be ascertained by reference to the plan and book of reference whether 100 or 500 feet or more was required to be taken. The last notice to expropriate limits the land to 100 feet; the prior notices under the same plan had claimed the full 566 feet.

The plaintiff and other owners of the property have registered a plan by which the land and property is subdivided and streets are laid out. This plan is entitled to priority over an invalid plan of the company. Sales of land have been made under it. The notice to expropriate was defective in that it was not accompanied by a surveyor's certificate.

The company must shew compliance with the Act to entitle it to possession: *Murphy v. Kingston & Pembroke Ry.*, 11 P.R. 304, *per Boyd, C.*, at p. 309.

Where there is a failure to comply with the Act the jurisdiction of the Judge is wanting, and the company may be restrained from acting under a warrant granted: *Brooke v. Toronto Belt Line*, 21 O.R. 401.

G. B. Henwood, for respondent (defendant) :—The warrants in question in these appeals were granted by Mr. Justice Beck under and in pursuance of the power given in sections 217 and 218 of the Railway Act, and the learned Judge in granting such warrants acted as *persona designata*, and there can be no appeal from his decision: *C. P. R. v. Little Seminary of Ste. Therese*, 16 S.C.R. 606, and, particularly, the language of Mr. Justice Patterson, p. 618. For this reason, as the second action was in the nature of an appeal, the question "X" in the stated case should have been answered in the negative, and the second action dismissed on that ground. See remarks of Boyd, C., in *Kingston & Pembroke Ry. Co. v. Murphy*, 11 P.R. 304, at p. 309, and Jacobs on Railway Act, edition 1909, pp. 323 and 324.

As to the company's main line, the plan, profile and book of reference were approved by the Board of Railway Commissioners, in pursuance of section 159 of the Railway Act, on August 15th, 1907, by order No. 3463, and the plan, profile and book of reference so approved were registered in the Land Titles Office, Edmonton, on August 29th, 1907, as plan 4012-S; subsequently, on the 19th November, 1907, a plan of this line drawn to a larger scale was deposited in the Land Titles Office as plan 7690-S, and notice of deposit was published in the "Edmonton Saturday News," on December 7th, 1907.

As to the branch line, the preliminary plan, profile and book of reference were deposited in the Land Titles Office on July 17th, 1907, as No. 7851-R, and were approved by the Board of Railway Commissioners by order dated January 21st, 1908. This order, with the plan, profile and book of reference, was filed in the Land Titles Office on March 6th, 1908, and notice of the deposit of the plan was published in the "Edmonton Bulletin" on August 31st, 1908.

It is submitted that the approval by the Railway Board of the plan, profile and book of reference of the main line, as required by section 159 of the Act, and the plan, profile and book of reference of the branch line, as required by section 223 of the Act, as indicated by the above two orders of the Board, is conclusive evidence of sufficient compliance with the provisions of the Railway Act, unless such orders are altered or changed by virtue of section 29 of the Railway Act.

In each of the cases cited by the appellant, viz.: *Parkdale v. West*; *Murphy v. Kingston & Pembroke*; *Brooke v. Toronto Belt Line*, no plans whatever had been filed covering the lands in question, and the cases are, therefore, not in point.

Substantial compliance with the provisions of the Railway Act as to the filing of plans, profiles and books of reference is sufficient, and in any event there should be no injunction: *Parkdale v. West*, L.R. 12 A.C. 602, 56 L.J.P.C. 66, 57 L.T. 602.

Cur. adv. vult.

March 13, 1909. The judgment of the Court (STUART and HARVEY, JJ.) was delivered by

STUART, J.:—With respect to the appeal from the order of Mr. Justice Beck directing the warrant of possession to issue, the preliminary objection was taken by counsel for the respondent company that Mr. Justice Beck was acting as *persona designata* in making the order, and that, therefore, in accordance with the decision in *The Canadian Pacific Railway Company v. The Little Seminary of Ste. Therese*, 16 S.C.R. 606, there is no right of appeal. There may be some doubt as to whether this case is now binding upon us in view of the subsequent insertion of section 220 into the Railway Act, but inasmuch as the plaintiff has in fact appealed from the order granting the warrants, and has brought his actions for injunctions as well, it is clear that the whole matter is now properly before us, either in the one form or the other. If there is no right of appeal, the plaintiff is certainly entitled, as pointed out by my brother Harvey during the argu-

ment, to come to the Supreme Court by means of an action and ask the Court to exercise its undoubted jurisdiction to inquire into the validity of the warrants of possession.

I do not consider it necessary to refer in detail to the rather complicated state of facts set forth in the stated case.

The plan, which, by section 158 of the Act, the company is required to file, must shew, among other things: the station grounds, the property lines and owners' names and the areas and length and width of lands proposed to be taken, in figures, stating every change of width.

The book of reference must describe the portion of land proposed to be taken in each lot to be traversed, giving numbers of the lots and the area, length and width of the portion of each lot proposed to be taken and names of owners and occupiers, so far as they can be ascertained. Section 177 provides that the lands which may be taken without the consent of the owner shall not exceed, for the right-of-way, one hundred feet in width, except in certain cases not necessary to be here mentioned, and for stations, etc., one mile in length by five hundred feet in breadth, including the width of the right of way.

With respect to the plan actually filed by the company it is sufficient, in my view, to say that it required a great deal of verbal explanation from the counsel of the company in addition to the information given on the plan presented to us, which was the plan filed, to give me any very clear idea as to what lands of the plaintiff in blocks 17 and 32 the company really intended to take. Certainly in block 32 the plan, if it disclosed anything, disclosed an intention to take a great deal more than 500 feet, which is the greatest width that can be taken, even for station grounds. Any one looking at the plan and observing that in block 32 at least 666 feet in width were intended to be taken would surely be somewhat in the dark as to the real intentions of the company. It was stated before us that a certain red line appearing on the map was intended as the centre line. But an examination of the whole plan shews that the red line is nowhere so described on the plan,

and it seems to me to be demanding rather too much of an owner of land to ask him to understand, without explanation, that this red line was intended as the centre line of the right-of-way. I think that the intention of the Act is that each owner shall be separately informed as to his own land, and that the plan shall shew him exactly what part of his land the company intends to take.

I quite agree with the view that a substantial compliance with the terms of the Act with respect to plans and books of reference is all that is needed in order to give the company authority to expropriate, and that compliance in absolutely every detail is not to be expected. But this much is surely requisite, that an ordinary owner of land should be fairly able to discover from the plans and books of reference, by the exercise of ordinary intelligence, what part of his lands the company does propose to take. I find myself quite unable to say that the plans and books of reference as filed did really put Marsan in this position. Even if the red line had been described as a "centre line" I am unable to assent to the proposition that the mere indication of the location of a centre line is enough, taken in connection even with the statutory restriction of right-of-way to 100 feet, to constitute a compliance with a clear statutory direction to shew on the plan the width, length and area, in figures, of the land proposed to be taken.

In my view, therefore, question "B" submitted in the stated case should be answered in the negative.

With respect to question "A," it seems to me that the facts set forth in paragraph 3 of the stated case, viz., that the plan No 7690-S does not shew the width or area of the lands proposed to be taken in Block 17 for the main line, that no book of reference of any kind whatsoever was deposited with this plan, and that the book of reference deposited with the former plan No. 4012-S contains no reference whatever to Block 17, are sufficient to shew that not even a substantial compliance was made with the provisions of the Act. The answer to question "A" should, therefore, in my opinion, be in the negative.

I think that the first definite information given to Marsan as

to what lands the defendant company desired to expropriate was given in the notices to expropriate, which were served on October 1st, 1908. The warrants were not issued by Mr. Justice Beck until October 31st. Prior to this date, viz., on the 20th of October, the plaintiff had registered a plan of subdivision of part of lots 32 and 33, shewing certain streets which extend across the 100 feet of right-of-way covered by one of the notices to expropriate. In view of the conclusion I have arrived at as to the non-compliance of the defendant company with the provisions of the Act, I think nothing had been done by the company which would prevent the registration of this plan or make it invalid. But it is difficult to see what advantage this can give to the plaintiff. It is clear that mere registration of such a plan does not constitute the streets shewn upon it public highways. There is no evidence presented to us shewing any acceptance of the streets by the municipality, no evidence shewing use by the public, no evidence shewing a sale of any lots to other parties, even if such a sale would be material. It is impossible, therefore, for us to give any answer favourable to the plaintiff to question "D" in so far as it refers to the right of the plaintiff to have the streets shewn on the plan recognized as highways.

With respect to question "X" a sufficient answer for the purpose of this case has, I think, already been given. If the orders of Mr. Justice Beck were appealable there might be a question, at least with respect to block 32 as to which the action was begun subsequently to the order, whether there would be any right to begin an action for injunction when an appeal is open to the owner. But there is here no necessity, for the reasons I have already given, to give any more definite answer to this question.

Having now answered the questions set forth in the stated case, it becomes necessary to consider the rights of the parties in view of the answers given.

It is to be first observed that by paragraphs 19, 20 and 21 of the stated case certain admissions are made by counsel for the defendant company as to the relief to which the plaintiff is to be entitled in case the questions submitted are answered in certain

ways. For myself I do not feel disposed to hold myself bound by these admissions of counsel as to the proper relief consequent upon certain findings of fact.

It was stated to us at the hearing and admitttd by counsel for the plaintiff that subsequent to the judgment of the Chief Justice an application had been made by the defendant company to the Board of Railway Commissioners sitting in Edmonton, for an order giving the company the right to expropriate certain definite portions of the plaintiff's land in blocks 17 and 32, that the Board had made the necessary order and that the plaintiff now knows finally by means of the plans filed on this application, with a copy of which he has been furnished, exactly what portion of his land the company intend to take. Prior to this, as I have already pointed out, the plaintiff was informed by the notices to expropriate, served on October 1st, what portions of his land they then intended to take under the general powers given them by the Railway Act. There is no evidence whatever that the plaintiff has been injured or prejudiced in any way, or that the company have acted oppressively in anything they have done.

In *Corporation of Parkdale v. West*, 56 L.J.P.C. 66, 57 L.T. 602, L.R. 12 A.C. 602, at p. 615 of L.R., Lord Macnaghten said: "If a person whose rights are injuriously affected is refused compensation, he may be compelled to bring an action for injunction. But even in that case the Court would probably not interfere with the construction of the works by an interlocutory injunction if the railway company acted reasonably and were willing to put the matter in train for the assessment of compensation. As Lord Romilly pointed out in *Wood v. Charing Cross Railway Company*, the granting of an injunction which stops the works of a railway company is not merely a question between the plaintiff and the company. The public have an interest in the matter. As a general rule it would only be right to grant an injunction where the company was acting in a high-handed and oppressive manner or guilty of some misconduct."

In *Hendrie v. The Toronto, Hamilton and Buffalo Railway*

Company, 26 O.R. 667, Meredith, C.J., delivering judgment on an application for an interlocutory injunction, said: "It was also urged that I ought not to interfere by granting at this stage of the litigation an injunction, the effect of which would be, it was said, to seriously embarrass the carrying out of an important work, and, perhaps, to put a stop to it entirely. But I do not think any serious consequences would follow from my taking that course, or that even if it were so I ought to permit the defendants, on what appears to me a disregard of the provisions of the law, to do what, upon the material before me, would result in serious and practically irreparable damage to the plaintiff's property. The defendants have, in my view of the law, no authority for doing what they intend to do, without having first taken the steps or obtained the authority already referred to. I think, however, having regard to the provisions of section 163 (this section corresponds to the present section 217 under which Mr. Justice Beck acted in issuing the warrants) I should not stop the defendant's work if the defendant company will give security for payment of the compensation to which the plaintiffs may be found entitled, to the extent of \$6,000, and will undertake to proceed forthwith under the Act to ascertain the amount of the compensation to be paid."

It would appear from the report of the same case in 27 O.R., p. 46, that a similar judgment was given by the same Judge at the trial of the action and upheld on appeal to a Divisional Court.

Now in the present case it is quite apparent that the company have not acted oppressively or in any high-minded manner. It is quite definitely settled what lands the company desire to take and are empowered to take. Following, therefore, the views expressed in the two cases from which I have quoted, I do not think the plaintiff should be granted a permanent injunction beyond that already given and consented to in one of the actions, provided the defendant company will undertake to proceed forthwith to take the proper steps to secure the registration of a proper plan in the Land Titles Office in accordance with the provisions of the

Railway Act, shewing the lands they now desire to expropriate, and are allowed to expropriate by the recent order of the Railway Board, and to assist in every way in their power to advance the arbitration as to compensation and damages referred to in paragraph 18 of the stated case. It seems to me the plaintiff is entitled to this undertaking, because, although he knew himself by the notices to expropriate what lands the company then intended to take, he may be intending to sell the land he is to retain, and there should be proper plans on file in the Land Titles Office which will give the necessary information to intending purchasers from him. The plaintiff should have the right reserved to him to apply in the actions to a single Judge for an injunction in case the defendants are guilty of any unnecessary delay in taking these proceedings, and that Judge may, of course, exercise his discretion as to whether any unnecessary delay has occurred or not.

There remains now only the question of costs to be disposed of, Indeed, it is very apparent that these appeals have been taken and, the proceedings continued almost, if not quite entirely, for the purpose of settling the question of costs. In the first action the judgment of the Chief Justice allowed the plaintiff all the costs. An injunction was agreed to with respect to all lands except those included in the notice to expropriate, of October 1st, and the effect of the judgment of the Chief Justice was to refuse an injunction with respect to the lands included in that notice. By this appeal the plaintiff has endeavoured to insist on his right to an injunction with respect to those lands as well. The result of our present decision is to refuse that right to an injunction. The plaintiff has gained nothing in the first action, therefore, by his appeal.

There is no suggestion that the lack of a proper plan has interfered with or prevented sales to purchasers from the plaintiff, and, while we require from the defendant company an expeditious compliance with the statute by filing promptly the proper plans, as a condition of their being relieved from an injunction against them, it is only upon a ground never mentioned, either

in the stated case or in the argument before us. I think, therefore, that so far as the first action is concerned there is no sufficient reason for giving the plaintiff his costs of the appeal.

With respect to the second action, I think the judgment of the Chief Justice should be varied only to this extent, that there should be no costs of the action to either party. The defendant company were certainly very remiss in not complying with the terms of the statute by filing plans, and by their neglect they left the road open to such a technical attack as has been made upon them by the plaintiff. While, therefore, the fact that the plaintiff knew from the notice to expropriate what lands of his they were intending to take, has been sufficient, in my view, to justify us in refusing an injunction, for the reasons I have given, I do not think it is sufficient to justify the Court in making him pay the defendant's costs, in view of the neglect as to the plans to which I have referred.

There should, I think, be no costs of the second action to either party, and as the only success the plaintiff has achieved by his appeal is to secure a change in an order as to costs, there should, I think, be no costs of the appeal to either party with respect to the second action.

It is, perhaps, proper to add that the same considerations which have led us to refuse the injunction asked for would also, in my view, be sufficient to justify us in refusing to interfere with the warrants of possession given by Mr. Justice Beck, even assuming that his orders are appealable, as to which we have not thought it necessary in this case to give a decision.

Judgment accordingly.

Edwards & Madore, solicitors for appellant (plaintiff).

Henwood & Harrison, solicitors for respondent (defendant).

EXPROPRIATION.

ALBERTA.]

[STUART. J.]

GIROUARD v. GRAND TRUNK PACIFIC R.W. CO.

(2 Alta. L.R. 54.)

The Railway Act, sec. 220—Practice—Appeal—Right of appeal—Judgment of a Court acting without jurisdiction—Res judicata—Trespass—Nominal damages—Costs.

The defendant applied for warrant of possession under the Railway Act regarding expropriation of lands, and the Judge, sitting in Court, granted the warrant of possession on facts which the Court *en banc*, in *Marsan v. Grand Trunk Pacific*, *supra*, held were not sufficient to give the Judge jurisdiction, and the order was therefore invalid.

The plaintiff, instead of taking an appeal from the order, brought an action against the railway company, claiming injunction and damages.

Held, that the plaintiff could maintain the action, for the reason that, even if an appeal would lie from the order, the plaintiff was entitled to additional relief by way of an injunction and damages which could not be given on appeal.

Held, also, the principle of *res judicata* would not apply, as the order granting the warrant of possession was made without jurisdiction: *Attorney-General for Trinidad v. Enriche*, 63 L.J.P.C. 6; L.R. (1893) A.C. 518, 1 R. 440, 69 L.T. 505, referred to.

Held, also, that the railway company having acted under the invalid warrant of possession had committed a technical trespass and was liable for nominal damages, which carried costs.

Marsan v. Grand Trunk Pacific Ry. Co., *ante*, p. 341, distinguished.

ACTION for injunction to prevent continuation of trespasses alleged to have been committed by the defendant on the plaintiff's land, and for damages for the trespasses already committed.

The defendant entered on the plaintiff's land under warrant of possession granted by Beck, J., sitting in Court, under the provisions of the Railway Act.

It would appear that the plans, profile and book of reference did not comply with section 158 of the Railway Act and were, therefore, on the authority of *Marsan v. Grand Trunk Pacific*, *ante*, p. 341, insufficient, and the order invalid.

The case was tried at Edmonton, per Stuart, J., on February 23rd, 1909.

Edwards, K.C., for plaintiffs:—There was no service upon Clovis Girouard, who was a joint owner of the land, of the notice

to expropriate or of notice of the application for possession. "These are at the very foundation of the Judge's authority in the matter." *Brooke v. Toronto Belt Line Co.*, 21 O.R. 401, at p. 407.

The company has obtained warrant for possession of the land for 260 feet in width, whereas the order authorizing the consideration of the land limits the company to 100 feet in width. The warrant even goes beyond the lines shewn on the railway plan. The plan and book of reference are not in compliance with the Railway Act, secs. 222, 224 and 158. There is no plan shewing changes directed by the Board. Without these the company is not entitled to exercise the powers given by the Railway Act: *Parkdale v. West*, 12 A.C. 602, 56 L.J.P.C. 66, 57 L.T. 602; *Grand Junction Ry. Co. v. Peterborough Corporation*, L.R. 13 A.C. 136, at p. 144; *Kingston & Pembroke Ry. v. Murphy*, 17 S.C.R. 582.

The company not being entitled to exercise the powers given by the Act, there is no jurisdiction in the Judge to grant a warrant, and the company may be restrained from proceeding under it: *Brooke v. Toronto Belt Line Ry. Co.*, 21 O.R. 401. The Railway Act is to be construed strictly. The general rule of the Court is not to extend the compulsory powers of a company beyond the express words or absolutely necessary implication. See *per* Boyd, C., in *Murphy v. Kingston & Pembroke Ry.*, 11 O.R. 582, at p. 586; *Lamb v. North London Ry.*, L.R. 4 Ch. 522, 21 L.T. 98, 17 W.R. 746; *Kingston & Pembroke Ry. Co. v. Murphy*, 11 P.R. 304.

There having been no publication of the notice of deposit of plan and book of reference under section 191 at the time possession was applied for, there was no authority for the making of the order.

The company not having deposited a valid plan and book of reference, the plan registered shewing streets laid out across the land in question is entitled to priority.

George B. Henwood, for the defendant:—In granting the

warrant of possession the learned Judge was acting as a Court, and the matter was *res judicata*, and in view of the amended section 230 of the Railway Act his order granting the warrant in question can only be attacked by way of appeal.

The plan, profile and book of reference in question have been duly approved by the Board of Railway Commissioners in pursuance of the procedure laid down in sections 222, 223, 224 and 225 of the Railway Act, and the order obtained from the Railway Board approving the plan, profile and book of reference and duly filed in the registry office is conclusive evidence that the defendant company has sufficiently complied with the provisions of the Railway Act to entitle it to expropriate the lands covered by the warrant in question.

The learned Judge reserved his decision.

March 31, 1909. STUART, J.:—The facts of this case are practically the same as existed in the case of *Marsan v. The Grand Trunk Pacific Railway Company*, in which judgment was recently given by the Court *en banc*.

Following the decision in that case, I hold that the plans in question in this action do not comply with the provisions of the Railway Act. This being so, it is quite unnecessary for me to deal with the question as to whether the plaintiff Clovis Girouard was properly served with the notice to expropriate, and the notice of the application for the warrant of possession.

Some question was raised as to whether or not there was not a right of appeal from the order granting warrant of possession, and it was contended that as there was such a right of appeal, an appeal should have been taken to the Court *en banc* instead of bringing an action. As the matter presents itself to me now, it seems to me quite clear that even if there were a right of appeal from the order of Mr. Justice Beek granting the warrant of possession, that certainly would not deprive the owner of the land from the right of bringing an action; because, just as in this case, a question of damages for wrongful trespass might be raised. If

the order were improperly given, then there would be at least technically a trespass, and it is easy to imagine a case in which the damages might be substantial. An appeal from the order giving the right of possession would allow no redress for such damages. Even, therefore, if there be a right of appeal owing to the terms of section 220 of the Railway Act, as to which I now say nothing more, as I did in my judgment of *Marsan v. The Grand Trunk Pacific Railway Company*, I think the owner has still a right to bring an action such as he has done here. It, of course, may be objected that if Mr. Justice Beck was acting as a court and not as *persona designata*, then the matter is *res judicata*. That principle, however, only applies where the Court giving the judgment invoked had jurisdiction in the premises: *Attorney-General for Trinidad v. Enriche*, 63 L.J.P.C. 6, L.R. (1893) A.C. 518, 1 R. 440, 69 L.T. 505. But the result of the decision of the Court *en banc* in the *Marsan* case, is, as it seems to me, this, that Mr. Justice Beck had no jurisdiction to make the order for the issue of the warrant, because the filing of proper plans, is, I think, a condition precedent to the existence of any jurisdiction to issue a warrant: *Brooke v. Toronto Belt Line Ry. Co.*, 21 O.R. 401. Of course, if the matter were before me alone I should hesitate to question the decision of a brother Judge on the matter of jurisdiction or to decide that he had acted without jurisdiction when he had inferentially at least decided that he had jurisdiction. But as I have the decision of the Court *en banc* now to follow, the case is different, and I am able, I think, without scandal, to hold now that Mr. Justice Beck acted without jurisdiction. The consequence is that the principal of *res judicata* cannot apply.

In the case of *Marsan v. The Grand Trunk Pacific R.W. Co.*, 2 Alta. L.R. 43, which was a stated case, nothing was before us, in so far as the proper relief was concerned, except the question whether or not the owner was entitled to an injunction. Nothing was said in the stated case about the possibility of granting damages. In the present case damages are claimed. In view of the decision in the *Marsan* case, I do not see how it is possible to

avoid giving the plaintiffs at least nominal damages. The result of the decision in that case is that the defendants here entered upon the plaintiff's land without any legal authority. I am not quite satisfied, however, that the plaintiffs have proved any substantial damage. The husband put his damages at one hundred dollars, but I am not satisfied that he was not making an unjustifiable claim in naming that amount. All he said was that his fences were cut and his cow got out from the pasture a number of times, and that some grading was done through his land. I think the justice of the case will be met by giving the plaintiffs fifteen dollars damages.

With regard to the claim for an injunction, nothing needs to be added to what I said in the *Marsan* case. Upon the defendants giving a similar undertaking to that which was exacted from them in that case, the injunction will be refused, but the plaintiffs are to have the same rights as were given to the plaintiff in the case referred to in so far as further applications may be concerned.

Nothing further needs to be said in regard to the plans of subdivision filed, shewing streets and lanes. What was said in the *Marsan* case is equally applicable here.

The plaintiffs are, I think, entitled to their costs of this action. I distinguish the present case from the second of the *Marsan* cases, in which the Court allowed no costs to either party, in this respect, that in the present case I hold that the plaintiffs are entitled at least to some small damage, and that, I think, is sufficient to carry costs. In the *Marsan* cases no question of the existence of damage was raised at all, and no claim for damage was made in the stated case. The whole matter rested upon the point whether or not the plaintiffs there were entitled to an injunction, and that was refused. It will be observed also that an obligation is placed upon the defendants by this judgment to file proper plans as a condition of being relieved from an injunction. Personally I now feel somewhat inclined to give more weight to this consideration in dealing with the question of costs

than was given to it in the judgment in the *Marsan* case and costs being in the discretion of the trial Judge I think this may furnish an additional reason for giving the plaintiffs their costs in this action. I think, however, they should be taxed on the lower scale, and the judgment will so direct.

Judgment accordingly.

Edwards & Madore, solicitors for the plaintiffs.

Henwood & Harrison, solicitors for the defendant.

INFANT—NEGLIGENCE.

CANADA.]

[SUPREME COURT.

SYDNEY AND GLACE BAY R.W. CO. V. LOTT.

(42 S.C.R. 220.)

Operation of tramway—Negligence—Injury to infant—Reckless running of car.

APPEAL from the judgment of the Supreme Court of Nova Scotia, 41 N.S.R. 153, reversing the judgment of Meagher, J., at the trial, and maintaining the plaintiff's (respondent's) action with costs.

Upon seeing a child (aged one year and eleven months) approaching the tracks, the motorman sounded the whistle of the car he was driving; the child stopped for a moment and looked towards the car; the motorman then applied full speed without waiting to see whether the child retreated or making any effort to remove it from the dangerous position; the child moved quickly towards the tracks, was struck by the car and received the injuries for which damages were claimed by the action. By the judgment appealed from, it was held that the conduct of the motorman was recklessness for which the company was liable,

that failure to take proper precautions to avert injury to the child was not to be excused by the alleged necessity of complying with the time-table and preventing delay to passengers and that the failure of the company to provide its car with a fender was evidence of negligence.

On November 25th. and 26th, 1907, the appeal was heard before Sir Charles Fitzpatrick, C.J., and Girouard, Davies, Idington and Duff, JJ.

After hearing counsel on behalf of the appellants and without calling upon counsel for the respondent, the Supreme Court of Canada dismissed the appeal with costs.

Appeal dismissed with costs.

Mellish, K.C., for the appellants.

W. B. A. Ritchie, K.C., and *Tobin*, for the respondent.

NOTES.

Affirming the judgment of the Court below, 41 N.S.R. 153, 8 Can. Ry. Cas. 276.

In *Cooke v. Midland Great Western R.W. Co. of Ireland* (1909), A.C. 229, the House of Lords had to consider the question of actionable negligence towards an infant between four and five years old playing with other trespassing children on a turntable (left unlocked and therefore dangerous). It was held that there was evidence for the jury of actionable negligence on the part of the railway company. The authorities are fully collected: See the following cases and notes thereon: *Farrell v. Grand Trunk R.W. Co.*, 2 Can. Ry. Cas. 249; *Tabb v. Grand Trunk R.W. Co.*, 8 O.L.R. 203, 4 Can. Ry. Cas. 1; *Potvin v. Canadian Pacific R.W. Co.*, 4 Can. Ry. Cas. 8; *Cormier v. Dominion Atlantic R.W. Co.*, 36 N.B.R. 10, 3 Can. Ry. Cas. 304; *Newell v. Canadian Pacific R.W. Co.*, 12 O.L.R. 21, 5 Can. Ry. Cas. 372; *Coley v. Canadian Pacific R.W. Co.*, Q.R. 29 S.C. 282, Q.R. 16 K.B. 404, 8 Can. Ry. Cas. 269, 274; *Burtch v. Canadian Pacific R.W. Co.*, 13 O.L.R. 632, 6 Can. Ry. Cas. 461.

FATAL ACCIDENT ACT—EXCESSIVE DAMAGES:

ONTARIO.]

[COURT OF APPEAL.

RONSON V. CANADIAN PACIFIC R.W. CO.

(18 O.L.R. 337.)

Fatal Accidents Act—Excessive damages—Death of wife and mother—R.S.O. 1897, ch. 166.

In an action under the Fatal Accidents Act, R.S.O. 1897, ch. 166, to recover damages for the death of a married woman, 62 years of age, the jury awarded \$3,325, apportioning \$325 to the executors of her husband who survived her, \$800 to a daughter 36 years of age, \$700 to a son 27 years of age, and \$1,500 to a son 21 years of age.

Held, that damages recoverable being entirely pecuniary, the above (except as to the executors), considering the ages and circumstances of the children, and the age and financial ability of the mother, were grossly excessive, and the case must go to a new assessment.

THIS was an appeal by the defendants from the judgment at the trial of this action at St. Thomas on April 22nd, 1908, before His Honour Judge Colter, Judge of the county court of the county of Elgin, sitting for and at the request of Magee, J., assigned to take the assizes for the county of Elgin.

The action was one of negligence, claiming damages for injuries sustained by Eleanor Ronson, deceased, wife of James Ronson, since deceased, and the defendants admitted liabilities for any damages which should be legally proved against them. By the judgment appealed from the defendants were ordered to pay to the plaintiffs the sum of \$3,325, apportioned by the jury as follows: To the executors of James Ronson, \$325; to Sarah Moffatt, aged 36, eldest daughter of deceased, \$800; to Charles L. Ronson, aged 27, eldest son of deceased, \$700; to George Ronson, aged 21, also a son of deceased, \$1,500.

The appeal was argued on February 3rd, 1909, before Moss, C.J.O., and OSLER, GARROW, and MACLAREN, JJ.A.

G. T. Blackstock, K.C., and Angus MacMurchy, K.C., for the defendants, appellants, contended that the damages granted were altogether excessive in view of the circumstances of the case, which are sufficiently set out in the judgment below: *Rowley v. London and North-Western R.W. Co.* (1873), L.R. 8 Exch., p. 221; that the damages had been assessed according to the mortality tables,

which was not proper: *Central Vermont R.W. Co. v. Franchere* (1904), 35 S.C.R. 68; *Vicksburg and Meridian R.R. Co. v. Putman* (1886), 118 U.S. 545, 556; that whenever a wrong measure of damages is given to a jury, a new trial should be granted: *Johnston v. Great Western R.W. Co.*, [1904] 2 K.B. 250.

C. A. Masten, K.C., for the respondents, as to *consortii damnum* referred to the *St. Lawrence and Ottawa R.W. Co. v. Lett* (1885), 11 S.C.R. 422; and contended that the executors of James Ronson had a right to recover; that the proper rule was laid down by Brett, L.J., in *Phillips v. London and South-Western R.W. Co.* (1879), 5 C.P.D. 280, at pp. 289-290; *Johnston v. Great Western R.W. Co.*, *supra*. He also referred to *Hetherington v. The North-Eastern R.W. Co.* (1882), L.R. 9 Q.B. 160; *Renwick v. Galt, Preston and Hespeler Street R.W. Co.* (1901), 6 O.W.R. 413; *Stephens v. Toronto R.W. Co.* (1905), 6 O.W.R. 657.

Angus MacMurchy, in reply.

April 5, 1909. The judgment of the Court was delivered by GARROW, J.A.:—Appeal by the defendants from the judgment at the trial before the Judge of the county court of the county of Elgin, sitting for Magee, J., and a jury, in favour of the plaintiffs.

The action was brought to recover damages for the death of Eleanor Ronson through the negligent operation of an engine and train by the defendants upon their railway.

Eleanor Ronson was the wife of James Ronson, and the plaintiffs, Charles L. Ronson, George E. Ronson and Sarah E. Moffatt are their children. The plaintiff Edgar Sandham is the executor of the last will of Eleanor Ronson, and the plaintiffs Charles L. Ronson and George E. Ronson are the executors of the last will of their father, who died after the accident and before action.

The accident occurred on September 3rd, 1907, but Eleanor Ronson survived until November 12th, 1907. The defendants at the trial admitted negligence. The jury assessed the damages at the following sums: to the executors of James Ronson, \$325; to Sarah Moffatt, the daughter, \$800; to Charles L. Ronson, a son, \$700; and to George Ronson, a son, \$1,500.

James Ronson was a farmer, living with Eleanor Ronson his wife, upon lands apparently owned by him in the township of Middleton, in the county of Norfolk.

Eleanor Ronson, according to the evidence, was a capable managing sort of woman, but there is no evidence that she had any considerable property or means of her own. What she managed, and no doubt managed very well, was, as far as appears, wholly the property of her husband. She was evidently very fond of her children and of helping them, but always apparently out of her husband's property. In addition she was always ready with competent advice and with active help in time of sickness or other stress.

The eldest child was Sarah. She was 36 years of age, and had been married and away from her parents' home for twelve years. The next was Charles. His age was 27 years. He, too, had been married for some years, and was doing for himself on land which his father had sold to him at a reduced price, helping him also with his live stock. The youngest was George, 21 years, who resided at home, and who, after the accident, and before his mother's death, also married and went to live on land supplied by his father.

The damages recoverable under R.S.O. 1897, ch. 166, are entirely pecuniary in their nature. The plaintiffs must shew by reasonable evidence that but for the negligent act of the defendant they were likely to have gained the amount of the damages which they seek to compel the defendants to pay. And they must shew not merely willingness on the part of the deceased, but ability—that is, the means, to do that which was not done because of the death. These children were all beyond the age when they required a mother's care in the ordinary sense, or, with spouses of their own, were very likely to be guided by a mother's advice.

The mother's own property was of so small an amount as to be quite insignificant as a source of pecuniary assistance to her children, and the personal services of a woman 62 years of age, as nurse or as a helper in the field, could in any event not have been reasonably expected to continue very long. There is not a particle of evidence (if it is of any consequence) that in helping the children out of her

husband's property she was not acting simply as his agent, and with his entire concurrence. And in the absence of evidence, that is, I think, the proper presumption. So that on every ground and however viewed, the large damages assessed by the jury are not based upon any proper view of the facts, and are at least grossly excessive.

I say "at least," because I have had, and still have, considerable doubt, in the case of some, if not of all the children, whether there was any reasonable evidence for the jury of pecuniary loss in any proper sense. But upon the whole I think it will be safer to permit the case to go to a new assessment, leaving this question entirely open.

The judgment in favour of the executors of James Ronson was not, I think, successfully or even seriously attacked, and may stand, and the appeal as to it be dismissed with costs.

The appeal should otherwise be allowed, and with costs, for the plaintiffs fail in that which was seriously in contention.

The costs of the last trial, except as to the plaintiffs the executors, should, under the circumstances, be reserved to be dealt with by the trial Judge.

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ANIMALS AT LARGE—DAMAGE TO CROPS.

MANITOBA.]

[COURT OF APPEAL.

HUNT V. GRAND TRUNK PACIFIC RAILWAY CO.

(18 *Man. L.R.* 603.)

BEFORE HOWELL, C.J.A., RICHARDS, PERDUE AND PHIPPEN, J.J.A.

Railway—Obligation to fence right of way—Railway Act, R.S.C., 1906, ch. 37, secs. 254, 427—Injury to crops caused by cattle straying from railway line not fenced.

The duty of a railway company to provide, under section 254 of the Railway Act, R.S.C., 1906, ch. 37, fences and cattle guards suitable and sufficient to prevent cattle and other animals from getting on the railway, is prescribed only to protect the adjoining land owners from loss caused by their animals being killed or injured on the track; and, notwithstanding the general language of section 427 of the Act which gives a right of action to anyone who suffers damages caused by the breach of any duty prescribed by the Act, an adjoining owner whose crops are injured by cattle straying on to his land from the railway track, in consequence of the absence of fences and cattle guards, has no right of action against the railway company in respect of such injury.

James v. G.T.R. (1901), 31 S.C.R. 420; *Gorris v. Scott* (1874), L.R. 9 Ex. 125, and *McKellar v. C.P.R.* (1904), 14 M.R. 614, followed.

Winterburn v. Edmonton Ry. Co. (1908), 8 W.L.R. 815, not followed. RICHARDS, J., dissented.

ARGUED: 3rd March, 1909.

County Court appeal.

THIS action involved the consideration of the Railway Act, R.S.C. 1906, ch. 37.

Cattle, not belonging to the plaintiff, got upon the railway track at a highway crossing because of the absence of cattle guards, and thence wandered on the plaintiff's field of growing grain because of the want of a fence between the plaintiff's land and the railway track, at a point where the defendants were required to fence by section 254 of the Act, and destroyed his crops to the extent of \$417.

Judge Ryan, who tried the case, gave a verdict for the defendants on the legal points raised and plaintiff appealed.

J. D. Hunt and W. D. Card, for plaintiff, appellant, cited *Plester v. G.T.R.*, 1 Can. Ry. Cas. 27; *Curran v. G.T.R.*, 25 A.R. 407; *Le May v. C.P.R.*, 17 A.R. 293; *Washington v. G.T.R.*, 28 S.C.R. 184; *G.T.R. v. James*, 31 S.C.R. 420; *Davidson v. G.T.R.*, 2 Can. Ry. Cas. 374; *Levesque v. N.B. Ry.*, 29 N.B. 588; *Lizotte v. Temiscouata Ry.*, 6 Can. Ry. Cas. 41; *Winterburn v. Edmonton Ry. Co.*, 7 W.L.R. 803; *Nichol v. Canada Southern Ry. Co.*, 40 U.C.R. 583, and *Pound v. Port Huron Ry.*, 19 Am. & Eng. Enc. 640.

H. J. Symington, for defendants, respondents, cited Railway Act, Consol. Stat. 1859, ch. 66, secs. 15, 16, 19; Railway Act 1868, ch. 28, sec. 11; Craie's Statutes, 4th ed., 216, *Gorris v. Scott*, L.R. 9 Ex. 125; *Buxton v. N.S. Ry.*, L.R. 3 Q.B. 549; *Carruthers v. C.P.R.*, 16 M.R. 323; *McKellar v. C.P.R.*, 14 M.R. 614; *Young v. Erie & Huron Ry.*, 27 O.R. 530; *James v. G.T.R.*, 31 S.C.R. 420; *Elliott v. Buffalo Ry.*, 16 U.C.R. 289, and *Clayton v. C.N. Ry.*, 17 M.R. 426.

April 12, 1909. HOWELL, C.J.A.:—Section 254 of the Railway Act requires that "the company shall erect and maintain upon the railway fences of a minimum height of four feet six inches on each side of the railway." It further requires that at the intersections of highways there shall be cattle guards with the fences turned to the edge of the guards, and sub-section 3 provides that "such fences, gates and cattle guards shall be suitable and sufficient to prevent cattle and other animals from getting on the railway."

The statute, therefore, requires the track to be enclosed by fences and guards. In this case the guards were not sufficient and the cattle got on the track at a highway intersection and straying along came to the plaintiff's property which they reached from the defendants' right of way, because the company had not erected the fence between the plaintiff's land and the railway, and caused the damage complained of. If the defendants had performed either of these two duties the cattle would not have got upon the track and from there to the plaintiff's land.

Section 427 gives a right of action to any one who suffers damages caused by the breach of any statutory duty, and one would think that the plaintiff's cause of action was complete. Mr. Symington, however, argued that the duty of the company was simply to protect the plaintiff from loss by preventing his animals from being killed by trains on the track.

Prior to 3 Edw. VII. ch. 58, there were in the statutes special statements as to the damages to which the adjoining owner was entitled in case the fences were not erected and maintained, but this provision disappeared in the above statute, and in the present Railway Act, but it appears in section 294 where Parliament is dealing with cattle at large. Under the statute existing existing prior to 3 Edw. VII. ch. 58, the case of *G.T.R. v. James*, 31 S.C.R. 420, was decided, in which it was clearly held that the statute requiring fences only required the rails to be fenced and so where the track was carried over a culvert or bridge and the fences were turned in at the sides of the culvert the law was complied with. Cattle and horses were thus permitted to cross the right of way and could trespass upon the adjoining owner with impunity so far as the Railway Company was concerned. Mr. Justice Sedgwick, at p. 431, as to the liability to damages, says: "The only penalty for breach of the requirements in regard to fences and cattle guards is that, in the event of the company's neglect, the company shall be liable to the owner, not for all damage which may happen to him or his property, but only for the damage which he may suffer on account of animals killed or injured by the company's trains or engines." This principle seems to be also applied in *McKellar v. C.P.R.*, 14 M.R. 614, and *Young v. Huron*, 27 O.R. 530.

Prior to the change in the statute these authorities shew two principles of law established: first, that the statutes require only the track or rails to be guarded by fences, not the railway lands; and second, in default the only liability created is for damages for cattle killed. Now have the changes in the statutes shewn an indication of Parliament to change this law? The statute of

1888 under which that case was decided required the maintenance of a fence "on each side of the railway" and the present Act requires that "the company shall erect and maintain upon the railway, fences of a minimum height of four feet six inches on each side of the railway." With this Supreme Court case before them Parliament re-enacted the same provision as to fences, and so I am bound to apply that case to the present law and hold that the company is not bound to fence its right of way, but only put up such fences as are required to protect the track from cattle.

As to the second point above mentioned. Section 254 starts out by declaring that the fences shall be four feet six inches in height and then, by sub-section 3, provides that "such fences, gates and cattle guards shall be suitable and sufficient to prevent cattle and other animals from getting on the railway." I cannot understand why the quality of the fence and gates required along the sides of the track is thus described. Why not require them to be sufficient to prevent animals from getting over or through them?

In this connection section 295 must be considered. The section seems to admit a liability of the company for not fencing as against an adjoining owner and provides that if such owner leaves the gates open he shall not be entitled to damages for animals killed on the track, but there is no provision as to what may happen if the gates are left open and cattle wander from the railway upon his lands. When the new legislation was enacted Parliament knew the judicial interpretation put upon the former statutes and knew that thereby the railway company was only bound to keep cattle off the track and the only liability incurred for not fencing was for cattle killed, and yet the original fence requirements were re-enacted and it was declared that the company should not be liable for cattle killed if an adjoining owner left the gates open. The defendants are not liable at common law; if liable at all the right must be found within the four corners of the statute. I am compelled to conclude that where fences are not built and maintained as required

by section 254 the company is only liable for cattle killed or injured on the track.

I think that the principles decided in *Gorris v. Scott*, L.R. 9 Ex. 125, support this conclusion. The English Contagious Diseases Act authorized the Privy Council to pass regulations as to the transportation of animals on vessels to England. Pursuant to this Act an order in council was passed requiring every ship to have pens for animals not more than 9 feet by 15 with battens on the deck for foot hold and that no ship should convey animals without these protections. The plaintiff shipped a number of sheep on the defendant's vessel but, because of the want of these protections, they were washed overboard. The plaintiff asserted that he relied upon these provisions when shipping and expected the protection. It was held, however, that the sole object of the regulation was to prevent contagion and over-crowding and that protection from the loss complained of was not contemplated by the Act. The Chief Baron says: "But the damage complained of here is something totally apart from the object of the Act of Parliament." If in that case the plaintiff's sheep had been injured by some contagious disease I should think there would be a clear right of action.

The company not being compelled to fence the right of way but only the track, and that fence to join the cattle guard at a highway intersection, it follows that a wide strip of the railway lands on each side of the railway may be left open from highway to highway for wandering cattle to get upon. There is no right to adjoining farmers to extend their line fences upon the right of way to the railway fence and therefore, to enclose their lands, they may be compelled at their own expense to fence off the right of way, a burden most serious in this province.

When I consider that new railways are being pushed over our prairie farms in all directions and that the right exists to take down fences without being compelled at once to fence the right of way, I regret the conclusion at which I have arrived and, having read the judgments in *Winterburn v. Edmonton*, 7

W.L.R. 801, and 8 W.L.R. 815, where a contrary conclusion was arrived at by the full Court of Alberta, I am led to doubt the soundness of my judgment. However, having considered this matter again and again, I can arrive at no other conclusion than the above.

The appeal is dismissed with costs."

RICHARDS, J.A.:—The facts are stated in the judgment of my learned brother the Chief Justice, which I have considered with great care. He feels bound by the decision of the Supreme Court in the case of *James v. G.T.R.*, reported in 1 Can. Ry. Cas. 422; 31 S.C.R. 420. I am much impressed with his views, and it is with great hesitation that I differ from them.

With every respect which a Judge owes to the judgment of a higher Court than his own, I find it difficult to understand the reasoning in the *James* decision. The views taken in the same case by the Court of Appeal for Ontario seem to me distinctly preferable. If, however, the law stood now as it did when the *James* case was decided, there would be no choice left us but to follow it. But, where the result of that case might be as disastrous as is pointed out in the judgment of my learned brother the Chief Justice, I feel that we should strain every possibility to distinguish the present case from it. To put on the Act a construction which would permit the railway company to simply place its fence close to its tracks (in cases where it is required by the Act to fence), and thereby drive the owners of adjoining farm lands to fence, for the safety of their own farms, along the line between them and the right of way, would put in the hands of the railways a serious instrument of possible oppression.

Surely the intention was, and is, that the owners of the adjoining farms as well as the railway should get the protection of the fences to be built by the railway, which could only be brought about by building on the outer edges of the right of way. Yet, if we are still bound to follow the *James* case, and to consider it applicable under the law as it now stands, we must hold that that is not any part of the intention of the Act.

While the section of the Act of 1888, which required the railway to fence, contained a sub-section confining the damages, in case of non-fencing, to injuries done by trains and engines to cattle, horses and other animals, not wrongfully on the railway and having got there through the omission to fence, there was an argument in favour of the view taken by Mr. Justice Sedgwick. But now that section 254, providing for fences, has no such sub-section, it seems to me that, though the section does say in sub-section 3 that the fences shall be suitable and sufficient to prevent animals from getting on the track, we are not thereby bound to hold that the provision as to fencing as it now stands is merely for the purpose of keeping animals off the track, and that it would be complied with by merely fencing the track itself, leaving open the portion of the right of way between such fences and the adjoining farms.

The provision as to the nature of the fences was in the body of section 194 of the Act of 1888, and it is still a proper requirement in any view of the present Act. Undoubtedly one great object still is to keep cattle from getting onto the track, and so it was properly retained in the new section. But, in view of the removal from section 194 of the 1888 Act of the provision as to liability for cattle killed, and of the enactment of that provision by a separate section, in a different part of the Act and under a different heading, I do not think we should hold now that it shews the whole liability for breach of the duties imposed by section 254, and that therefore protection of the track from cattle is the only object of fencing, but that we may now take the view which was adopted by the Ontario Court of Appeal in the *James* case, and which, as to the present Act, is taken in the judgment of Mr. Justice Stuart in the case of *Winterburn v. Edmonton*, reported in 8 W.L.R. 815, that the fences should be on the line between the right of way and the adjoining lands.

If I am right in the above, then the omission to fence in this case was the cause of cattle getting into the plaintiff's field and injuring his grain, and under section 427 of the present Act the plaintiff should recover damages.

I would allow the appeal with costs and enter judgment for the plaintiff for \$417 with costs in the Court below to the plaintiff.

PERDUE, J.A. :—The various enactments relating to the fencing of railways passed prior to the Railway Act, 1903, shew that the purpose of those enactments was to impose upon railway companies the duty of erecting fences for the purpose, in so far as adjoining owners were concerned, of preventing cattle from getting upon the tracks and being injured by trains. Section 194 of the Railway Act of 1888 dealt with this matter. It declared that fences should be erected and maintained of the height and strength of ordinary division fences, and also cattle guards at highway crossings suitable and sufficient to prevent cattle and other animals from getting on the railway. Sub-section 3 of that section declared what should be the liability of the railway company in case of omission to comply with the requirements as to fencing and placing cattle guards. The only liability for which the company was responsible in consequence of such omission was to make good in damages any loss sustained by the owner of cattle which got upon the railway by reason of the neglect to erect and maintain fences and cattle guards and which were injured by the company's trains or engines.

Section 199 of the Railway Act, 1903 (now sec. 254 of R.S.C. 1906, ch. 37), re-enacts the provision as to erecting and maintaining fences and cattle guards. It declares that the fences shall be of a minimum height of four feet six inches on each side of the railway and that such fences and cattle guards shall be suitable and sufficient to prevent cattle and other animals *from getting on the railway*. There is no special provision in the Act declaring what shall be the liability of the company in case of its failure to observe the requirements of the section. The general penalty clause, R.S.C. 1906, ch. 37, sec. 427, declares that where the company omits to do any matter, act or thing required to be done by it, it shall be liable to any person injured by such omission for the full amount of damages sustained thereby.

It is contended that under these two last mentioned sections the defendants are liable for the damage caused by cattle which entered on his crop from the defendants' right of way by reason of the failure to construct fences and cattle guards.

The history of the legislation and provisions relating to the same matter contained in earlier Acts are important in interpreting the meaning of a statute: Maxwell on Statutes, 48. In none of the former railway Acts was there any provision which made the railway company liable for damage caused by cattle entering on land from its right of way. The provisions contained in the present Act compel the company to construct fences and cattle guards sufficient to prevent cattle from getting on the railway. The prior legislation in regard to fences and cattle guards had clearly for its object the exclusion of cattle from the right of way. This having been the object of the fencing provision for such a long period of time, it seems to me that we must consider the words, "sufficient to prevent cattle getting on the railway," as not merely descriptive, but as shewing the purpose of the enactment and the object in view, namely, to prevent cattle from getting on the track and being injured.

In England a statute required a railway company to fence its line for the purpose of preventing cattle from straying upon the railway. Although this might give the landholder a right of action in case there was a breach of the enactment and his cattle were injured by getting on the line in consequence of it, yet a passenger injured by an accident caused by such cattle getting on the line was held not entitled to an action for neglect to fence: *Buxton v. N.E.R.*, L.R. 3 Q.B. 549.

At common law the defendants are not bound to fence their property. Their obligation to do so must be created by the statute, if such obligation is to exist. The case just cited shews that the meaning of the statute cannot be stretched so as to include a liability for default, which does not appear clearly to have been contemplated. I would refer to *Gorris v. Scott*, L.R. 9 Ex. 125; *Atkinson v. Newcastle Waterworks Co.*, 2 Ex. D. 441; *McKellar v. C.P.R.*, 14 M.R. 614.

A different interpretation of the enactment in question has been given by the Supreme Court of the North-West Territories in *Winterburn v. Edmonton Ry. Co.*, 8 W.L.R. 815, and I regret that I cannot come to the same conclusion. A substantial injury was caused to the plaintiff by the omission to fence, but before he can obtain relief it must be shewn that the injury was one for which the statute intended to provide a remedy.

I agree that the appeal should be dismissed with costs.

PHIPPEN, J.A., concurred with HOWELL, C.J.A., and PERDUE, J.A.

Appeal dismissed.

ANIMALS AT LARGE—SIDING AGREEMENT.

ONTARIO.]

[DIVISIONAL COURT.

WOODBURN MILLING CO. v. GRAND TRUNK R.W. CO.

(19 O.L.R. 276.)

Railway—Agreement for Use of Siding—Construction—Protection of Railway from Animals—Negligence—Gate Left Open—Escape and Destruction of Animal—Implication of Terms in Contract.

A siding was constructed by the defendants from the main line of their railway to the plaintiffs' mills, which stood in a two-acre enclosure bounded on one side by the defendants' fence. At the point where the siding entered the plaintiffs' land the defendants constructed and maintained a gate across the siding and connected with the fence on each side; this gate was usually kept shut by the defendants' servants except when taking cars to or from the mills, but it was not alleged that there was any agreement that the defendants should keep it shut. The gate was left open by the defendants' servants on one occasion after they had removed a car from the siding, and the plaintiffs' horse, which was loose in the two-acre yard, escaped through the gate and was run over by a train of the defendants on the permanent way. In an action to recover damages for the loss of the horse, the jury found that the injury was caused by the negligence of the defendants' servants in leaving the gate open. A clause in the agreement between the parties concerning the use and maintenance of the siding provided that the plaintiffs should "protect the railway of the company from cattle and other animals escaping thereupon from such portion of the siding as may be outside of the lands of the company:"—

Held, that this meant that the plaintiffs should keep animals from escaping from that part of their land occupied by the siding to the property of the company; the defendants owed no duty to the plaintiffs to keep their

animals away from the line of railway; the placing of the gate by the defendants, their custom of closing it, and the complaints of the plaintiffs that it was sometimes left open, could not create such a duty; and, therefore, there could be no negligence on the part of the defendants.

Per RIDGELL, J., that in the construction of the agreement it was of no significance that the clause above quoted was in the printed form of the defendants, a great part of the form having been struck out and much matter written in; also, that the practice of importing implied terms into a contract is a dangerous one; and there could be no implication here of a condition that the plaintiffs would be relieved from the agreement if the defendants left the gate open.

Judgment of the County Court of Middlesex affirmed; *BRITTON, J.*, dissenting.

THIS action was brought in the County Court of Middlesex to recover \$200 damages for the loss of a horse owned by the plaintiffs, which was killed by a train of the defendants, owing, as the plaintiffs alleged, to the negligence of the defendants.

The action was tried before *MACBETH, Co. C.J.*, and a jury on the 8th December, 1908. The jury found that the injury to the plaintiffs' horse was caused by the negligence of the defendants' servants in leaving open the gate across the switch line leading to the plaintiffs' mill. The County Court Judge reserved judgment, and on the 9th January, 1909, dismissed the action, giving the following reasons:—

In the month of August, 1907, the plaintiff company owned and operated flour mills in Glencoe. These mills stand in an enclosure of about two acres in extent, which is bounded on the south by the defendant company's fence. During the ownership of the plaintiffs' predecessors in title, a siding was constructed from the main line of the railway to the mills. The location of the siding and of the mills is shewn on the plan attached to the agreement made between the parties concerning the use and maintenance of the siding. The street shewn on the plan to the east of the mills has not been opened, and is enclosed with the plaintiffs' lands. A black mark made by a witness on the plan, at the point where the siding is shewn as entering the plaintiffs' land, indicates the position of a gate made and maintained by the defendants across the siding and connected with the railway

fences on either side: this gate is usually kept shut by the defendants' servants except when taking cars to or from the mills.

On the afternoon of the 14th August, 1907, the plaintiffs loaded a car at the mill, and notified the defendants' station agent that it was ready for removal. On the same day, about 8 o'clock p.m., the plaintiffs' horse was turned loose in the two-acre field in which the mills stand, and between 9 and 10 o'clock the same evening the defendants' servants entered the siding with a locomotive and removed the loaded car: in order to do this they opened the gate on the siding. The plaintiffs' horse was in the mill-yard at 1 o'clock on the morning of the 15th August. Shortly after daylight on the same morning the plaintiffs' servant found that the gate across the siding was standing open, and that the horse had been run over by a train of the defendants on the permanent way, at some distance east of the mills. The horse was worth \$200.

The foregoing facts were admitted, or established by undisputed evidence. The jury found that the defendants' servants who took away the car from the mill on the night of the 14th August negligently left open the gate, thereby allowing the plaintiffs' horse to escape from that portion of the siding which is on the plaintiffs' land to the defendants' permanent way, where he was struck by a train.

The defence is rested upon clause 10 of the agreement between the parties: "10. The contractor (i.e., the plaintiffs) shall protect the railway of the company from cattle and other animals escaping thereupon from such portion of the siding as may be outside of the lands of the company."

This is not very well drafted, but it is part of a formal contract and clearly intended to have some meaning: full effect should be given to whatever meaning may be fairly ascribed to it.

The agreement does not make any mention of a gate, nor was any gate shewn on the plan attached thereto. And, if a gate had not been placed and maintained by the defendants, the plaintiffs would undoubtedly be bound by clause 10 to protect the defen-

dants against the escape of animals from that portion of the siding which is on the plaintiffs' lands to the defendants' permanent way.

Then is the plaintiffs' obligation affected by the fact that a gate had been placed and was maintained on the siding by the defendants, that the defendants' servants were ordered to keep this gate shut, and that these orders were repeated when the plaintiffs complained that the gate had been left open? The gate had to be opened whenever cars were brought to or taken from the mill. And by clause 8 of the agreement the defendants have the right to use the siding "in the conduct of its business as a common carrier and carrier of passengers," and to permit other persons to use it for loading and unloading freight. The gate might, therefore, be frequently opened for any of these purposes, and on each occasion would probably remain open for a time longer than strictly necessary for entrance and exit of cars; there was also the risk that the train men might go away, leaving it open, especially when, as in the present case, they used the siding after nightfall.

The defendants consider that as against the public they are obliged by the Railway Act to keep this gate shut. If the plaintiffs neglected to keep the mill-yard enclosed, thereby permitting cattle and other animals to have access to that part of the siding which is on the plaintiffs' land, and if, the gate being open, these animals thereby got out on the permanent way and were injured by train, the defendants would probably have to pay damages, with the right, as I think, to claim an indemnity from the plaintiffs.

In the present case, as against the plaintiffs, I think the defendants have the right to say that the plaintiffs agreed to protect the defendants against the escape of animals from that part of the siding which is on the plaintiffs' land to the defendants' lands; that the claim in the present action arises out of a breach of that agreement by the plaintiffs; and that, as against the plaintiffs, the defendants were not bound to prevent animals

from entering the railway lands at the opening made in the railway fence for the construction of the siding, the obligation to do this having been assumed by the plaintiffs. I refer to *Yeates v. Grand Trunk R.W. Co.* (1907), 14 O.L.R. 63, and the cases there cited.

I think the action should be dismissed with costs.

The plaintiffs appealed from the judgment, and their appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ., on the 3rd March, 1909.

J. C. Elliott, for the plaintiffs. Although by the agreement an obligation is cast upon the plaintiffs, if there is negligence the plaintiffs are entitled to recover. The wording of the agreement is not sufficient to meet the claim for loss by such negligence as we have here. The defendants are not suffering from the plaintiffs' breach of duty, if any. The plaintiffs are entitled to the strictest possible construction of a document prepared by the defendants. Negligence has been found by the jury, and that is sufficient. Reference to *Owners of Cargo on Board S.S. Waikato v. New Zealand Shipping Co.*, [1899] 1 Q.B. 56, 58; Dominion Railway Act, 1903, sec. 200; MacMurchy & Denison's Railway Law, p. 319.

W. E. Foster, for the defendants. I rely on the agreement, clause 10; the defendants must fail unless the agreement saves them. The plaintiffs had no right to have an opening in the fence. The plaintiffs asked for the siding; it is there for their convenience, and they are to pay \$25 a year for it. Reference to *Soulsby v. City of Toronto* (1907), 15 O.L.R. 13; *Yeates v. Grand Trunk R.W. Co.*, 14 O.L.R. 63; *Higgins v. Canadian Pacific R.W. Co.* (1908), 12 O.W.R. 1030.

Elliott, in reply. There is no evidence that the plaintiffs asked for the siding.

September 7, 1909. RIDDELL, J.:—This is an appeal from the judgment of the Judge of the County Court of Middlesex. The facts appear in his judgment.

It was argued that the contract should be taken as strongly as possible against the defendants, and, being so taken, the plaintiffs should recover upon the findings of the jury. I do not agree. While, apparently, the contract is upon the printed form of the defendants (though even that is not proved), it is apparent that the terms of the contract must have been canvassed between the parties—a great part of the printed form has been cancelled and much matter typewritten in. From the document it appears that the railway company owned the siding in question, and the plaintiffs asked the railway company to allow them to use the siding for better accommodation for shipment by rail of the products of their mill, and the railway company assented. The terms are then set out, some in typewriting and some left as in the original printed form. It is not apparent why in this case any deviation should be made from the ordinary rules for the interpretation of a contract; and the fact that sec. 10 is printed and remains as in the original form can have no significance. The section reads: "10. The contractor [*i.e.*, the plaintiffs] shall protect the railway of the company from cattle and other animals escaping thereupon from such portion of the said siding as may be outside of the lands of the company. . . ."

I do not see that it can be at all doubtful that this means that the plaintiffs will keep cattle and other animals from escaping from that part of their land occupied by the siding to the property of the company—it seems to me it does not and cannot mean only that the plaintiffs shall reimburse the company for any damage caused to their railway by (say) hogs rooting, cows scraping, and horses rolling. The meaning is "cover or shield from . . . harm, damage, trespass, etc.:" Century Dict. *ad voc.*

The object is plain—the company desired to be secured against animals coming upon their railway to the peril of their trains, their employees, and their passengers; that object could be attained only by keeping animals off the railway — this the plaintiffs agreed to do. This being the case, the company owed no duty to the plaintiffs to keep their animals away from the line

of the railway, unless, indeed, the placing of the gate by the company, the custom of the railway company to have this gate closed from time to time, or the verbal complaints of the plaintiffs that the gate had been found open after being used by some of the railway company's crews, could create such a duty.

There is no pretence that the gate was placed across the opening under any agreement that the railway company should keep it shut—if one were to conjecture, it is likely that it was placed as it was by the railway company for greater caution; but no duty could arise from the placing of the gate across the opening; nor can the practice of generally, but not always, closing the gate add anything to the duty of the defendants. "The precaution taken . . . must have been wholly voluntary, and it would be much to be deplored if the defendants' liability were increased by their taking additional precautions. . . If a person undertakes to perform a voluntary act, he is liable if he performs it improperly, but not if he neglects to perform it. Such is the result of the decision in the case of *Coggs v. Bernard*, 1 Sm. L.C., 6th ed., 177:" *per* Willes, J., in *Skelton v. London and North Western R.W. Co.* (1867), L.R. 2 C.P. 631, at p. 636. This has been recently followed by my brother Britton in *Soulsby v. City of Toronto*, 15 O.L.R. 13, and is undoubted law.

The opening of the gate was necessary for the common business of the plaintiffs and defendants, and the non-closing was a neglect to perform a voluntary act.

"There is no such thing as negligence in the abstract, negligence is simply neglect of some care which we are bound by law to exercise towards somebody:" *Daniels v. Noxon* (1889), 17 A.R. 206, 211; *Thomas v. Quartermaine* (1887), 18 Q.B.D. 685, especially at p. 694, *per* Bowen, L.J. "The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence:" *per* Lord Esher, M.R., in *Le Lievre v. Gould*, [1893] 1 Q.B. 491, at p. 497.

No duty existing to close the gate which the defendants were

bound to perform toward the plaintiffs, the jury should not have found negligence on the part of the defendants at all, and, indeed, the whole effect of their finding is that the gate was not closed by the railway employee.

The evidence of the conductor in which he answers the question, "Either the conductor will fasten it or see that his brakeman fastens it, that is the conductor's duty?" thus, "Yes, he has got to see the gate is closed," does not advance matters. If the answer "Yes" is intended to be to the latter part of the question ("that is the conductor's duty?") it is a mere opinion of the conductor, which is not evidence. The whole evidence makes it clear that he was talking about the usual custom. In any event the question is one of law and not of fact.

Complaint by the plaintiffs to the defendants of their neglect to do that which it was not their legal duty to do cannot raise any duty.

No duty existing on the part of the railway company toward the plaintiffs to keep any gate or fence at the point in question, and none to keep a gate closed or to close it if opened, there can be no negligence on the part of the company in respect of the plaintiffs, and so the action should fail.

With great respect for those whose views are different, it appears to me that any argument which could import here into the agreement of the plaintiffs a condition, so that they would be relieved from the agreement if the defendants left the gate open, must be equally effective in *Yeates v. Grand Trunk R.W. Co.*, 14 O.L.R. 63, to import a similar condition relieving the plaintiff from the effect of the agreement of his landlord if the trains of the defendants were run too fast or without proper signals. Nor is there any rule forbidding any person or any company, railway or otherwise, from making a contract relieving them from the consequences of negligence on the part of their employees. The everyday example of bills of lading, insurance, etc., shew the contrary. The "unruly horse" public policy has not yet run wild to that extent.

The practice of importing implied terms into a contract is a dangerous one. So far as our Courts are concerned the Privy Council have checked the practice in *The Queen v. Demers*, [1900] A.C. 103. See *Hill v. Ingersoll and Port Burwell Gravel Road Co.* (1900), 32 O.R. 194.

"Where a contract is silent, the court or jury who are called upon to imply an obligation . . . which does not appear in the terms of the contract, must take great care that they do not make the contract speak where it was intentionally silent:" Cockburn, C.J., in *Churchward v. The Queen* (1865), L.R. 1 Q.B. 173, 195.

"Where the parties have made a contract which contains a variety of stipulations and is silent as to others, no stipulation or agreement which is not expressed ought to be implied, unless it is necessary to give to the transaction the effect or efficacy which both parties must have intended that it should have:" Lord Alverstone, C.J., in *Ogdens Limited v. Nelson*, [1903] 2 K.B. 287, at p. 297.

I am unable here to see that there is any necessity requiring any restriction of the agreement of the plaintiffs; and, with all respect, it seems to me that to allow the plaintiffs to recover here would be "taking a prodigious liberty with a contract:" *Johnston v. Dominion of Canada Guarantee and Accident Insurance Co.* (1908), 17 O.L.R. 462, at p. 483. And it is not, in my view, at all necessary to consider what might be the rights of the parties under some different state of facts.

In my opinion, the learned County Court Judge was right, and the appeal should be dismissed with costs.

BRITTON, J.:—The plaintiffs' claim is for the value of a horse killed upon the railway of the defendants on the 17th August, 1907, owing, as alleged, to the negligence of the defendants.

The action was tried with a jury, and the findings of fact were that the horse was killed by the negligence of the defendants' servants, such negligence being the "leaving open the gate across the switch line leading to the plaintiffs' mill."

The learned Judge dismissed the action, holding that the defendants are protected against any such liability for damage to animals of the plaintiff by clause 10 of a special agreement entered into between the parties. The facts are fully set out in his reasons for judgment.

The clause in question is as follows: "The contractor (plaintiffs) shall protect the railway of the company from cattle and other animals escaping thereupon from such portion of the said siding as may be outside of the lands of the company, and shall at all times keep the whole of said siding clear of snow, ice, and obstructions."

Upon the argument, it was conceded by the defendants that upon the findings of fact they are liable in this action, unless protected by the agreement.

In *Yeates v. Grand Trunk R.W. Co.*, 14 O.L.R. 63, it was decided that an agreement between the railway company and the owner of adjoining land, exonerating the company from liability for damages for cattle killed or injured by the company at the crossing, was valid. Such an agreement, as between the company and the land owner, relieved the company from the statutory duty of maintaining the fence and gate. Such an agreement gave the company no right to use, for any purpose, any land of the proprietor outside of the railway land. This is an entirely different agreement from the one in the *Yeates* case.

The first thing is to determine what the agreement here really means. The words used, in their ordinary and grammatical sense, are hardly sufficient to protect the defendants in this action. The protection of the railway from any possible damage by animals is not what the railway company desired or expected to get, by this agreement. I will, however, assume that the agreement means at least that the plaintiffs were to do all that would be reasonably necessary to prevent animals from escaping from the land of the plaintiffs to the land of the defendants. That being so, the defendants would not be liable to the plaintiffs for not building or maintaining a fence separating the plain-

tiffs' property from that of defendants. If the defendants did nothing as to a fence, the plaintiffs could either erect one, sufficient to prevent cattle escaping, or they could keep their animals altogether off their land, or they could place a person in charge to keep animals from escaping. If the plaintiffs did erect a fence sufficient to prevent animals from escaping, then the defendants would have no right to interfere with that fence in such a way as to render it useless as a protection to the plaintiffs' animals. There was such a fence erected by the defendants, but the plaintiffs had a right while it stood to rely upon it as sufficient protection. With it there, as a continuous fence, the animals could not escape upon the defendants' lands. Having such a fence, sufficient for the purpose, and if the animals of the plaintiffs did not escape by reason of any wilful or negligent act of the plaintiffs, the plaintiffs' agreement would be performed, and, in my opinion, there would be no liability under it to the defendants.

The recitals in the agreement aid in its construction. They are in part that the defendants construct the siding; the plaintiffs had permission to use it; the siding and all materials are the property of the defendants. Then the contract provides that the plaintiffs shall be at all the cost of maintenance and repair, and that all switches connecting the siding with the railway of the defendants shall be under the sole control of the defendants, and that the defendants have the right to use the siding for their business, as carriers. The siding could not be used either for storage or moving of cars without the connecting switches. The gate in this fence was for a necessary opening through which the cars were moved upon and from this siding. As I have said, it must be assumed upon the findings that the fence, and the gate when closed as a part of the fence, were good and sufficient to keep animals from escaping. The defendants knew this, and knew that the plaintiffs' animals were in that enclosure, or, not knowing whether there or not, and taking no trouble to inquire, owed a duty to the plaintiffs to close the gate after the cars were

moved upon, or taken off from, the siding. Non-performance of that duty was negligence.

The agreement ought to receive that construction which the language will admit of, and which will best effectuate the intention of the parties, to be collected from the whole of it: *Leake on Contracts*, 5th ed., p. 146; and *Ford v. Beech* (1848), 11 Q.B. 842, 866.

It may be conceded, although not necessary to go so far, that the plaintiffs were, as against their own acts, or permission, and as against strangers, bound to protect the defendants from animals escaping, but the agreement does not go so far, nor was it the intention of the parties that it should go so far, as to protect the defendants against their own negligence.

It was argued that by this agreement the duty of maintaining the fence at all times was shifted from the defendants to the plaintiffs. The agreement must be taken as a whole. It provides for the user by the defendants of the plaintiffs' land. That, by the work upon the ground, was shewn to be by means of making an opening in the fence, which the plaintiffs were to maintain. The gate was provided to be opened and closed, and it is to be implied that the defendants were, in using this land, to exercise reasonable care as to opening the gate and closing it when no longer necessary for it to remain open. The defendants recognised this duty, and the conductor who was a witness at the trial said he did close the gate, but the finding of fact was, upon evidence which would warrant the finding, against the defendants. The case before us is, therefore, of an omission to close the gate, and I think that omission was negligence.

A contract relieving a railway company from the performance of a duty, even a statutory duty, may be valid, and in such a case the non-performance of what, without the contract, would be a duty, is not negligence.

In this case there was, in my opinion, the new duty created by and arising out of the right given to the defendants to use the plaintiffs' land, and the contract in this case does not go so far as

to grant immunity to the defendants in case of non-performance of that duty. Speaking generally, the contract should not be so interpreted as to relieve the defendants from their own negligence.

Suppose that there was in fact no fence between the plaintiffs' land and the railway, and that the agreement was that the plaintiffs should keep their horse in the stable upon that land and not allow it to escape from the stable to the railway; and suppose that the agreement provided that the defendants could, for pay, store chattels in the stable with right of access to these chattels at all times. If the employees of the defendants in the night time, without notice to the plaintiffs, entered the stable, finding the door securely closed, removed the chattels, and left the door open so that the horse could escape, and did escape, and did go upon the defendants' railway and did damage to the railway, would the plaintiffs be liable for such damage? I think not. If the horse was killed by the defendants under such circumstances as, apart from the agreement, would render them liable, they would not be protected by reason of such agreement.

For reasons above given, I think the appeal should be allowed and judgment entered for the plaintiffs against the defendants for \$200 with costs of the action, and the defendants should pay the costs of the appeal.

FALCONBRIDGE, C.J.:—I find myself constrained to agree with the opinions of the learned Judge appealed from and of my brother Riddell.

It is unfortunate, in view of the able dissenting judgment of my brother Britton, that the case can go no further.

The appeal is dismissed with costs.

CARRIER—CONTRACT—LIMITING LIABILITY.

BOYD, C.]

[DIVISIONAL COURT.

LAMONT V. CANADIAN TRANSFER CO.

(19 O.L.R. 291.)

Carriers—Lost Luggage—Contract of Carriage—Receipt—Condition Limiting Liability—Notice—Agents of Owner—Alteration of Oral Contract—Negligence—Damages.

The defendants were an incorporated company, a main part of whose business was to carry and deliver baggage or luggage for customers, to and from railways, steamboats, and other public conveyances. The plaintiff, who was a passenger on a steamer, on his arrival at the wharf in Toronto handed the steamer check for his trunk to his father-in-law, R., to have the trunk sent up to R.'s house. R., who was an employee in the Customs, handed the check to H., also a Customs officer, and asked him to pass the trunk and have it sent up to the house. H. gave D., the defendants' agent on the wharf, the check and twenty-five cents which R. had given him, told him to have the trunk sent up to R.'s house, and walked away. D. then gave the money to S., a soliciting agent of the defendants, and proceeded to take the steamer check off the trunk. H. returned in about fifteen minutes after he had left the check and the money with D., and asked him for a receipt for the trunk. S. then wrote out the receipt and handed it to H., who looked at but did not read it, nor was his attention called to any terms upon it—he knew, however, that the defendants were in the habit of giving receipts upon taking over baggage for transfer. About an hour and a half thereafter H. handed the receipt to R., who passed it on to the plaintiff, who did not read it till about ten days afterwards. The receipt was a document which had legibly printed on its face a notice by which the defendants agreed to receive and forward the articles for which the receipt was given, subject to a condition that they should "not be liable for any loss or damage of any trunk . . . for over \$50." The receipt was in a form generally used by the defendants in the course of their business, and no proof was given that their agents who did the work of receiving and receipting for baggage had authority to receive it on any other footing. The trunk was lost or stolen; but without negligence on the part of the defendants. The defendants tendered to the plaintiff \$50 as in full discharge of their liability under their contract, which the plaintiff refused, and brought this action:—

Held, MEREDITH, J.A., dissenting, that the plaintiff was entitled to recover the full value of the trunk and its contents, inasmuch as the defendants, who as common carriers were liable to their customer for the full value of the property entrusted to their care, in the absence of notice, brought home to the customer, that their liability was limited to a certain sum, had failed to discharge the onus which lay upon them to shew that the plaintiff at the time when he made his contract with the defendants had received notice that their liability was limited, or that the stipulation limiting their liability had been at any time accepted by him as a term of his contract.

Harris v. Great Western R.W. Co. (1876), 1 Q.B.D. 515, *Henderson v. Stevenson* (1875), L.R. 2 H.L. Sc. 470, and other cases bearing on the liability of carriers for loss or damage to luggage discussed.

Per MEREDITH, J.A., that the question whether the plaintiff had accepted the condition limiting the defendants' liability was one of fact, and the finding of the trial Judge in favour of the defendants should not be reversed unless plainly shewn to be wrong on the evidence. Judgment of a Divisional Court, reversing the judgment of BOYD C., at the trial, affirmed.

THIS was an appeal by the defendants from the judgment of a Divisional Court reversing the judgment of BOYD, C., at the trial dismissing the action with costs.

The action was brought by the plaintiff to recover the value of a trunk carried by the defendants for hire, and lost or mislaid. The facts are fully stated in the judgments.

The action was tried at Toronto on the 10th April, 1908, before BOYD, C., without a jury.

R. S. Robertson and *R. F. Segsworth*, for the plaintiff.

B. N. Davis, for the defendants.

April 11, 1908. BOYD, C.:—The claims of the plaintiff to recover are put on three grounds: (1) that the defendants undertook for hire to receive and transfer his trunk to its proper destination (53 Robert street, Toronto), without conditions; (2) that, if there was any condition that in the event of loss they were not to be liable beyond the extent of \$50, it was not made known to the plaintiff till after the loss, and so he is not affected by it; (3) that the evidence shews that the defendants were negligent and are chargeable as for the conversion of the trunk.

The defendants are, no doubt, in the position of common carriers, and they have become incorporated under the general Dominion statute for the purpose of carrying on a baggage transfer company. The practical operations are carried on by a body of soliciting agents who take the baggage checks from passengers, receive the fixed fee charged, and give a voucher or receipt, which uniformly has on its face a notice legibly printed of the terms on which the transfer is undertaken. It is

thus expressed (so far as material in this case): "The Canadian Transfer Company agrees to receive and forward the articles for which a receipt is given, subject to the following conditions, viz., this company will not be liable for any loss or damage of any trunk . . . for over \$50."

The law is that a common carrier who gives no notice limiting his liability is an insurer of the property received; but, if he gives notice, which is brought home to the customer, that he will be liable only to a limited extent, he ceases to be an insurer beyond that limit.

Here the general system of the company was to take the baggage with restricted liability; and no proof was given that the minor agents who did the work of receiving and receipting had authority to receive baggage on any other footing, so as to bind the company to a larger responsibility. See what is said on this by Blackburn, J., in *Harris v. Great Western R.W. Co.* (1876), 1 Q.B.D. 515, at pp. 533-4.

What happened was that the plaintiff's steamer check was given to his father-in-law, who was in the Customs; he passed it to Horn, a friend, also in the Customs, who gave it to Dunn, the defendants' agent in charge of the baggage room on the wharf, and paid him twenty-five cents. Dunn took the money and checked the baggage with the defendants' check, taking off the steamer check. Dunn handed the money to Saunders, the soliciting agent of the defendants, who forthwith made out a receipt for it on the usual form. In about fifteen minutes afterwards, Horn came back and got the receipt, which he says he looked at, but did not read. He knew the company gave receipts, and it was a common thing for passengers to leave their checks with the landing-waiters (such as Horn) to be attended to. Horn must have been familiar with the *modus operandi* of the company and the nature of the receipt; this, I think, would be a proper inference from all the evidence. Horn gave the receipt to the plaintiff's father-in-law about 10.30 a.m., and it is not further traced, and the father-in-law was not examined.

It appears that the trunk with the defendants' check was taken over to the distributing point of the company—a baggage room in the Union Station—and was put in the north-west run of trunks, which were kept separate, and were to be distributed at 11 a.m. It does not appear to have been sent out at that time on that run, and has not been seen or heard of since—though all manner of inquiries, investigations, and advertisements have been made use of by the company; it is lost, and there is no evidence of any lack of reasonable care or precaution on the part of the company. The disappearance seems to be an unaccountable accident, and not traceable to any negligence that would render the company liable for a conversion.

I do not think that the plaintiff can escape from the effect of knowledge of the restricting notice by the plea that Horn was not his agent to receive notice, or not his agent to enter into a conditional contract. Horn was acting as the *alter ego* of the owner, and notice to him affected the owner, unless there was prompt repudiation of the receipt—which has not yet happened.

There is no evidence of any unconditional contract by the company—everything points the other way; there was no completion of the matter when the twenty-five cents was paid and the transfer of checks made; there was yet to be given the receipt and notice which completed the contract on the part of the company, and the receipt of it by Horn a quarter of an hour afterwards was a continuation and completion of the whole bargain as to the carriers' undertaking.

The contract was plainly spread on the fact of the receipt, which Horn took and looked at and kept and handed over to the father-in-law, and which forms the basis of the plaintiff's action. It would be most dangerous to hold that the agent or the principal taking such a receipt in such a manner is not to be bound by it because he fails to read it. The company, in the discharge of their business, can do no more; plain notice in legible print is given on the face of the receipt; and their right to be protected

by it cannot turn upon the possibility that the careless customer or his careless agent may omit to read it: *Parker v. South Eastern R.W. Co.* (1877), 2 C.P.D. 416; *Acton v. Castle Mail Packets Co. Limited* (1895), 1 Com. R. 135.

I see no escape from the conclusion that the action fails and should be dismissed with costs. The company tendered \$50, which was refused; this may be applied in reduction of the costs.

From this judgment the plaintiff appealed to a Divisional Court, and the appeal was heard before FALCONBRIDGE, C.J.K.B., MACMAHON and RIDDELL, JJ., on the 15th and 16th June, 1908.

R. S. Robertson, for the plaintiff.

B. N. Davis, for the defendants.

October 31, 1908. FALCONBRIDGE, C.J.:—This case has been most ably discussed by both my learned brothers.

James Dunn was in charge of the baggage-room for the defendants on the 22nd June. Riddy, the father-in-law of the plaintiff requested a brother officer of H. M. Customs, one Horn, to get the trunk in question sent up to his (Riddy's) place, giving him at the same time the steamer check and twenty-five cents to pay the charges for delivering it.

Horn gave the check to Dunn and told him it was from one of the men in the Customs House. Dunn offered to "O.K." it for him, *i.e.*, to send it up without charge. Horn refused, saying Riddy had given him twenty-five cents to pay for it, gave Dunn the money, and walked away.

Probably fifteen minutes after, Horn came back and asked for a receipt, and was given the paper containing the notice which the defendants rely on as limiting their liability to \$50. Horn says he did not read it; he gave it to Riddy about an hour and a half later.

However, before Horn returned and asked for the receipt, Dunn had "stripped" the trunk, *i.e.*, taken the steamer check off it. This act completed the final and absolute taking posses-

sion of it by the defendants. A contract binding on the defendants had then been entered into prior to the giving of the receipt. The defendants in thus accepting the plaintiff's trunk for carriage and delivery assumed the risks and liability of a common carrier, and the act of Dunn in handing Horn, who asked only for a receipt, a paper purporting to alter a contract already made, without at least calling special attention to it, cannot effect such alterations.

In my opinion the appeal ought to be allowed and judgment entered for the plaintiff for \$487.35 with costs here and below.

MACMAHON, J.:—The check received by the plaintiff from the Richelieu and Ontario Navigation Company for his trunk and given to Mr. Riddy, his father-in-law, was by him handed to Mr. Horn, a Customs landing waiter at the Yonge street wharf (where the baggage is landed from the steamer and where the defendants have a store-room) with instructions to have the trunk re-checked by the defendant company to be delivered at Mr. Riddy's residence in Robert street.

After Horn had performed his duty as an officer of the Customs, in examining the contents of the trunk and passing it, he would, for the purpose of having the trunk re-checked, be the plaintiff's agent, and when, after handing the twenty-five cents to Dunn, the defendants' agent, he returned to procure a receipt, it was as if the plaintiff had gone himself and demanded it; and he is in no better position than if he had personally obtained the receipt, which is as follows:

"THE CANADIAN TRANSFER COMPANY LIMITED
TORONTO, CANADA.

Nos. of R.R. checks.

Where going.

47975

53 Robert St.

To insure the prompt delivery of baggage passengers should see that their address and check num-

bers are put down correctly on this receipt, which must be returned to the driver on delivery of baggage.

Passengers should see that the exact amount paid for baggage is marked on this ticket.

Charges:

25 Pd.

The Canadian Transfer Company (Limited)

Agrees to receive and forward the articles for which a receipt is given subject to the following conditions, viz:

This company will not be liable for any loss or damage of any trunk, valise, or package, or thing, for over \$50.00, nor upon any property or thing unless properly packed and secured for transportation, nor for any fabrics consisting of or contained in glass.

Nor shall this company be liable for loss or damage unless the claim thereof shall be made in writing within thirty days from the accruing of the cause of action."

When the receipt was given, and not until then, was the contract completed, and Mr. Horn understood that a receipt should be obtained by him from the transfer company, shewing that the money had been paid, and that the trunk was to be delivered at the address given in Robert street. The conditions are plainly printed on the receipt, and any person accepting it who was not illiterate would at once recognize that conditions were attached to the receipt.

In the case of *Harris v. Great Western R.W. Co.*, 1 Q.B.D. 515, Richard Harris, who deposited the plaintiff's luggage with the company, obtained a receipt which on its face contained the place of deposit, viz., "Luggage and Cloak Office," a description of the articles deposited, and the amount paid by the owner for each article, which was signed by the receiving clerk, and was "subject to the conditions on the other side." The conditions on the other side were lengthy. Richard Harris said his

attention was not called to the conditions, although he believed there were some conditions. The railway servants put cloak room labels on the packages and left them without any other protection in the vestibule to which passengers had access. They were stolen by a thief, who was afterwards convicted, but only part of the property was recovered. It was not disputed that the loss was occasioned in consequence of the defendants' servants having failed to exercise proper care in and about the safe-keeping of the luggage thus left with them. Mr. Justice Blackburn had no difficulty in reconciling his judgment in that case with the judgment of the House of Lords in *Henderson v. Stevenson* (1875), L.R. 2 H.L. Sc. 470. He said (pp. 529, 530): "I call attention to this matter particularly, because I not only think myself bound to obey the decision of the House of Lords in *Henderson v. Stevenson*, but I also think (if I rightly understand the judgment) that, though that decision goes a step further than any prior decision of which I am aware, it is a logical extension of a principle which had been previously recognized by the Courts; and therefore I do not only obey that decision but acquiesce in it. But there are expressions used by the different Lords which seem to express opinions which were not, I think, part of the decision of the case then before them, and which are not, in my opinion, correct when applied to the case we have before us of a ticket given on the deposit of goods with a company who do not hold themselves forth as general receivers of goods to be kept for hire, but let it be known that though they do not and will not, as a general rule, receive or keep such goods, they will take them if the passenger brings them to a particular office, and there receives a ticket, on the production of which the goods will be given up to the person producing it. On the deposit of goods with a bailee who receives reward, so as to bring the case within the fifth head of bailments, mentioned by Lord Holt in *Coggs v. Bernard* (1703), 2 Ld. Raymond 909, 1 Sm. L. Cas., 11th ed., p. 173, the bailee (unless he is one who has the responsibilities of a public carrier

or innkeeper) undertakes no further obligation than to take proper care that the goods are safely kept from loss or injury; the deposit and receipt by the bailee for reward proves, as a matter of law, that the bailee received them on the terms that he undertakes this, and is responsible for any loss or injury occasioned by any neglect of the duty which he has thus undertaken. But if the bailor and bailee agree that the goods shall be deposited on other terms than those implied by law, the duty of the bailee, and consequently his responsibility, is determined by the terms on which both parties have agreed. And it is clear law that where there is a writing, into which the terms of any agreement are reduced, the terms are to be regulated by that writing. And though one of the parties may not have read the writing, yet, in general, he is bound to the other by those terms; and that, I apprehend, is on the ground that, by assenting to the contract thus reduced to writing, he represents to the other side that he has made himself acquainted with the contents of that writing and assents to them, and so induces the other side to act upon that representation by entering into the contract with him, and is consequently precluded from denying that he did make himself acquainted with those terms."

In *Henderson v. Stevenson* there were on the face of the ticket the letters indicating the name of the steamboat company, and the words "Dublin to Whitehaven," but there was no reference on the face of the ticket to the conditions printed on the back, and the passenger had not read and was unaware of them. Lord Cairns, referring to that, said: "The present is a case in which there was no reference whatever upon the face of the ticket to anything other than that which was written upon the face. Upon that which was given to the passenger, and which he read, and of which he was aware, there was a contract complete and self-contained, without reference to anything *dehors*."

Mr. Justice Blackburn then proceeded to refer to the case he had in hand, and said (p. 532): "But, in the present case,

the ticket has on the face of it a plain and unequivocal reference to the conditions printed on the back of it, and any person who reads that reference could, without difficulty, look at the back and see what these conditions were; and, that being so, the question comes to be, whether the plaintiff is not precluded from setting up that Mr. Harris, who acted for her in taking that ticket, never looked at the face of the ticket or bestowed a thought on what the conditions were; in other words, whether, by depositing the goods and taking this ticket, he did not so act as to assert to the defendants that he had looked at and read the ticket and ascertained its terms, or was content to be bound by them without ascertaining them, and so induced them to enter into the contract with him in the belief that he had assented to its terms. I think he has so acted."

When the case of *Parker v. South Eastern R.W. Co.*, 2 C.P.D. 416, reached the Court of Appeal, Bramwell, L.J., at p. 426, said: "It is clear that if the plaintiffs in these actions had read the conditions on the tickets and not objected they would have been bound by them. No point was or could be made that the contract was complete before the ticket was given." And he pithily asks, at p. 427: "Why is there printing on the paper, except that it may be read? The putting it into their hands was equivalent to saying, 'Read that.' Could the defendants practically do more than they did? Had they not a right to suppose either that the plaintiffs knew the conditions, or that they were content to take on trust whatever is printed?"

See also *Watkins v. Rymill* (1883), 10 Q.B.D. 178; *Zunz v. South Eastern R.W. Co.* (1869), L.R. 4 Q.B. 539, at p. 542; *Robertson v. Grand Trunk R.W. Co.* (1895), 24 S.C.R. 611.

The contract between the plaintiff and the defendants was complete when Horn demanded and received the receipt and not before. The conditions are printed on the face in good sized type, and are contained in ten or twelve lines which can be read in thirty seconds.

I consider the case in hand is governed by *Harris v. Great*

Western R.W. Co., and that the judgment of the Chancellor is therefore right.

The appeal, I think, should be dismissed with costs.

RIDDELL, J.:—The defendants are a transfer company, who, we are informed, have, by agreement with the railway and steamboat companies bringing passengers into Toronto, the sole and exclusive right of going upon trains and steamboats and soliciting custom for their business, which is mainly, at least, the transferring of baggage from the station or wharf to residences or hotels. The plaintiff entrusted a trunk to this company at the Yonge street wharf for transfer to 53 Robert street, and paid for such transfer. The trunk was lost while in the care of the defendant company, and, although the trunk contained wearing apparel, furs, etc., of the value of nearly \$500, the defendants contend that they should pay only \$50; and that because, shortly after they had received the trunk and the steamer check for it, and had been paid for the transfer, upon being asked for a receipt, the document they handed to the person who had paid contained printed terms which relieved them from paying more. I venture to think that if the law supports them in this claim it is time for Parliament to interfere and prevent a monopoly of facilities for soliciting such business upon the public conveyances being allowed to a company insisting upon such a claim. It is said that the "receipt" should have been read by the person receiving it and by the owner of the trunk—who would think of reading a receipt given in this way? And who would suppose a receipt would be or could be intended to be a special contract?

If, however, it be the law that the defendants can escape ninety per cent. of liability in this way, it cannot be too widely known—so that travellers may be on their guard.

The facts are that the plaintiff on his wedding journey arrived on the Richelieu and Ontario Navigation Co. boat from Clayton on the morning of the 22nd June, 1907, a Saturday morning; he and his wife were to go to the house of her father, Mr. Riddy,

53 Robert street; they handed the steamer check for the trunk in question to Mr. Riddy to have the trunk sent up to 53 Robert street. Mr. Riddy is an employee in the Customs department, and he saw Mr. Horn, the landing waiter on the Yonge street wharf, and handed him the check and asked Horn if he could pass the trunk and have it sent up to his place. Horn took the check and also the coin—twenty-five cents—which Riddy had given him, and went over and saw Mr. Dunn, the agent of the defendants on the wharf, told Dunn that Mr. Riddy would like to get this trunk up as soon as possible, that Mr. Riddy was one of the men in the Customs house. Dunn offered to send the trunk up to the address given gratis; but Horn said, "No, Mr. Riddy gave me twenty-five cents to pay for it, and you might as well take the money." Horn then gave Dunn the money—he had already given him the check—and went away. There was no talk of any special contract, or of any contract, and had nothing more taken place it is hard to see that there was anything but a plain and simple contract to deliver the trunk, for the consideration which had been paid.

The defendant company have a contract with the Richelieu and Ontario Navigation Co. whereby they take possession of all the baggage coming in on the boats—naturally this will assist them in securing a great part of the transfer work.

Dunn upon receiving the "quarter" turned around and gave it to Saunders, the soliciting clerk, and himself proceeded to "strip" the trunk, *i.e.*, to take the steamboat check off it. Of course, he had no right to do this, unless he was in possession of the trunk for his company. Horn had walked away as soon as he had paid over the money to Dunn. About fifteen minutes after, he came back and said, "You'd better give me a receipt for that trunk, so I can shew I paid that twenty-five cents, because I don't want him (Riddy) to think I didn't pay for it." Dunn's story is a little different. He says that Horn came back for a receipt and said something might happen that trunk. He does not, however, dispute the lapse of time

alleged by Horn, and the differences in the two stories are, to my mind, immaterial. What was asked for was a receipt for the trunk, and there was no question or suggestion of any contract or special term, or of anything to modify or affect the arrangement already made. Then it was that Saunders wrote out the receipt and handed it to Horn. From a casual reading of Saunders's evidence it would seem as though he were saying that he made out and gave the receipt immediately upon receiving the money, but this is not so: see the evidence of Horn and Dunn; and that the receipt was made out after the "stripping" of the trunk, and therefore after the payment of the money, appears from the evidence of Thompson.

Horn's attention was not called to any terms upon the "receipt;" he did not read it, merely looked at it, and didn't see any writing on it; he knew that the defendants were in the habit of giving receipts upon taking over baggage for transfer. About one hour and a half thereafter, Horn handed the check to Riddy, who passed it on to the plaintiff, who did not read it until about ten days afterwards.

The trunk was taken by the defendants from the Yonge street wharf to the Union Station, there placed in a "wide open depot," as the defendants' agent calls it, placed amongst the trunks for delivery in the north-west part of the city for the 11 o'clock delivery; and, so far as the defendants or their servants called at the trial will say, it is never seen again. On Saturday evening the defendants, on being telephoned to, said that the trunk would be sent up early on Sunday morning; inquiry on Sunday did not produce the trunk; on Monday the plaintiff went away to Buffalo on the 7 a.m. train, his wife went with him to the station and saw Mr. Penny, who was taking Mr. Thompson's place at the time. She asked Penny if they had found the trunk, and he answered no. On Wednesday she again went down and saw both Penny and Thompson, the superintendent of the defendants at the Union Station, who said that the trunk could not have gone out on any train and it must have been sent

to the wrong address; that he was hunting for it. The defendants advertised for it four times in all the evening papers, suggesting that it had been delivered to the wrong number—to the wrong person. Thompson says that he did not say to Mrs. Lamont positively that it had been delivered to a wrong address, but that is as far as he will go.

The defendants advance no theory as to the manner in which the trunk disappeared. Counsel upon the argument was invited to suggest any theory for the mystery except that of wrong delivery, but failed to do so.

The learned trial Judge has given effect to the contention of the defendants, *ante* p. 294, and the plaintiff now appeals.

The judgment appealed from is based upon three cases: *Parker v. South Eastern R.W. Co.*, 2 C.P.D. 416; *Harris v. Great Western R.W. Co.*, 1 Q.B.D. 515; *Acton v. Castle Mail Packets Co. Limited*, 1 Com. R. 135. The last is also (and better) reported in 73 L.T. 158 and 8 Asp. M.C. 73, and will be considered later. The other two are cases of deposit of goods in a cloak room at the station of a railway.

In the case in 1 Q.B.D. the Court distinguished *Henderson v. Stevenson*, L.R. 2 H.L. Sc. 470, the case of a common carrier, from the case then under consideration—the “case of a person depositing goods with a company who were in no way bound to receive them, and contemporaneously receiving a ticket, which he knew was to be given up when the goods were demanded back.” This the plaintiff in that case did not know; see p. 533.

In the case in 2 C.P.D. the Lords Justices disagreed, but the majority of the Court, Mellish and Baggallay, L.JJ., held that there could be no obligation on the plaintiff to read the condition upon the receipt, and that the jury should be asked whether the company did that which was reasonably sufficient to give the plaintiff notice of the condition. In that case not only was the condition printed upon the ticket, but a placard with the same information legibly printed was hung up in the cloak room.

The *Acton* case was a trial before Lord Russell in 1895. The

plaintiff bought a ticket from Durban to London: on the margin and in bold print were the words, "Issued subject to the further conditions printed upon the back hereof," and on the face of the ticket itself was printed matter which the plaintiff saw, but did not read; on the face was the clause, "The owners do not hold themselves responsible for any loss, damage, or detention of luggage under any circumstances," and on the back, in italics, the provision that the company would not be liable for luggage unless the passenger paid at a certain rate. The Lord Chief Justice, who tried the case without a jury, first decided that under the statutes, certain of the lost luggage could not be recovered for—the judgment then proceeds to consider whether the conditions on the ticket were the terms and conditions of the contract of passage of the plaintiff, and holds (8 Asp. M.C. at p. 75) that "the communication of that document to him was (in the circumstances of this case) reasonable notice to him of the terms and conditions upon which his passage-money was received from him, and upon which the defendants were willing to enter into a contract to carry him . . . The plaintiff . . . must have known, and at least ought to have known, that when he was engaging a passage in such circumstances as these, there would necessarily be conditions regulating the circumstances under and upon which he was to be carried. He candidly says that he did see that there was written and printed matter upon the face of the document, but that he did not read it; that there was a printed notice of a cautionary kind in the same sense put up in his cabin, but that he did not read it until after the loss." The Lord Chief Justice, after saying that "in all cases of contracts of passage of this nature documents are delivered which are not mere documents of receipt, but are documents which do contain conditions," adds, "I therefore come to the conclusion that the plaintiff, candidly admitting that he saw that there was not merely writing but printing upon the face of the document, ought to have assumed, and I think he must have known that it probably did contain conditions upon which he was about to be carried . . ."

These cases do not seem to me to conclude the present, for reasons which will appear later. Before discussing the effect of these and other cases which were cited before us, it will not be amiss to consider the general law.

The defendants are a transfer company, and it is well established—indeed it is admitted and is found by the Chancellor—that they are common carriers. “Transfer companies pursuing the business of transferring baggage or freight to and from railroad or steamboat depots, or between different parts of towns or cities, are common carriers and subject to liability as such:” 6 Am. & Eng. Encyc. of Law, 2nd ed., p. 253; cf. vol. 3, p. 581. We asked for the charter of the company, which is said to be a Dominion corporation, and we are by the defendants handed their provincial license as shewing their charter powers. The charter of the company, as appears from the provincial license produced, authorizes the company “(a) to collect, receive, transfer, convey and forward baggage, luggage, goods, wares, produce, merchandise and all articles of commerce and other effects, and to carry and convey passengers to and from any places in Ontario; (b) to warehouse and store (including cold storage) any of the said articles so transferred or received for transfer by the company, and (c) to acquire, etc., etc. . . . use and operate such vehicles as may be requisite or incidental to the carrying on of the company’s business.”

It will be seen that the company have powers of a very wide character; it is proved that they as a fact do sometimes transfer goods which are not baggage. See the evidence of Harper, p. 26: “render services in the transportation of freight and baggage to whomsoever wants it transported and for hire;” and specific instances are given. See also p. 28. No denial is attempted of the specific instances given, nor indeed of the general statement; the manager contenting himself with saying that the “waggonns are all baggage waggonns,” and that they “have no freight waggonns.” It is established that the defendants are and hold themselves out as common carriers of goods—at the very least of the

particular kind of goods, personal baggage. Such being their status, it is their "duty . . . to receive and carry the goods of any person offering to pay his hire," except under circumstances which do not arise here: Macnamara's Law of Carriers, 2nd ed., art. 22; their responsibility is "fixed by the acceptance of the goods:" *ib.*, art. 38; that responsibility continues "until they reach the final destination to which they are addressed," "in the absence of special limitation of liability:" *ib.*, art. 39; and, in the absence of special limitation, are "liable by the custom of the realm, in case of loss of or injury to the goods, unless the loss or injury arises from—(1) the act of God; (2) the King's enemies; (3) contributory negligence on the part of the bailor; (4) an inherent vice in or natural deterioration of the thing carried:" *ib.*, art. 45. They may limit their common law liability by receiving the goods subject to certain conditions, or in any other manner making a special contract with the consignor: *ib.*, art. 83. The existence of a special contract must be proved by the defendants if a special contract be alleged, otherwise the defendants are insurers. The single question here is, "Has a special contract been proved by the defendants?" And the answer to that depends upon whether the "receipt," delivered as it was, is a special contract.

The two cases first cited do not assist—they are cases of companies receiving goods which they were under no obligation to receive—not as common carriers at all. The duties and responsibilities of bailees of that kind are markedly different from those of common carriers, and in the *Harris* case this is pointed out very clearly by Blackburn, J., at p. 533. After discussing the case of *Henderson v. Stevenson*, L.R. 2 H.L. Sc. 470, to which reference will be made later, he says: "The defendants, as a railway company, are not bound to receive goods at all for custody; they give notice that they will not receive them by any of their servants in general, but any one wishing to deposit goods with them must go to a particular office, there pay the proper remuneration, and receive a ticket. No man can come to that

office without knowing so much. Few can come without knowing that the ticket is to be kept and produced when the goods are taken away, a term which would not be implied by law if the ticket were merely a receipt for the money, and Mr. Harris (the plaintiff) did in fact know this."

The *Parker* case is still further from being an authority in favour of the defendants, as the Court of Appeal held that, even in the case of such a bailment as is under consideration, the plaintiff must either know of the limiting condition, or the defendants must have done that which was reasonably sufficient to give him notice of the same.

The *Acton* case presents more difficulty, but full effect may be given to it without damage to the plaintiff's case. It may well be that, granting that the defendants would otherwise be common carriers in respect of the plaintiff's luggage, any reasonable person engaging a passage of such length as from Durban to London "must have supposed that in a contract of passage of this kind accompanied by baggage and by luggage it is absolutely necessary that there be conditions regulating the conduct of the passenger, and giving to those representing the ship-owner certain powers of control, without which it would be impossible to preserve discipline and order and ensure the safety of passengers and of their property on board ships; and, therefore, it cannot reasonably be supposed that any person taking a ticket for a passage of this kind could be under the notion that the whole contract between them was embraced in his paying passage money and merely getting a receipt for the same. A person taking a ticket under such circumstances must have understood, and must be taken to have understood, that there would be necessarily incident to such a relation as he was contemplating entering upon, certain conditions regulating the nature and character and obligations relatively of that agreement." Granting all that is said, there is an obvious distinction between hiring a passage on a ship from South Africa to England with baggage and luggage, and getting a trunk transferred from the wharf at Toronto to a private house in that city. The latter is

procured every day by handing a railway check and twenty-five cents to a carter. There are no regulations, etc., etc., necessary.

Watkins v. Rymill, 10 Q.B.D. 178, was relied upon by the defendants. That was the case of a special bailment—the defendant was keeper of a repository for the sale on commission of carriages, etc. The plaintiff delivered him a waggonette to be sold, and took from him a printed form which contained a receipt followed by the words, “subject to the conditions as exhibited upon the premises.” One of these conditions gave power to the defendants to sell goods remaining over one month on their premises. The plaintiff did not read the ticket, and it was held that he was conclusively bound by the condition.

The case is distinguished from *Henderson v. Stevenson* (there is a misprint on p. 183, the report reading, “the circumstances of the present case have ‘an’ (instead of ‘no’) analogy to those of *Henderson v. Stevenson*”). The *ratio decidendi* is much like that in the *Acton* case—see p. 183: “The circumstances of the contract were such that any man of ordinary intelligence must have known that special terms as to its execution must in the nature of things be made.” And even thus, this case has been blown upon in our own Supreme Court in the *Robertson* case in 24 S.C.R. 611—see pp. 617, 618.

The *Zunz* case in 1869, L.R. 4 Q.B. 539, was decided upon what it was supposed was the effect of the authorities binding upon that Court—see at p. 544: “We are bound on the authorities to hold, that when a man takes a ticket with conditions on it, he must be presumed to know the contents of it and must be bound by them.” If that was the state of the authorities in 1869, it is, I think, clear that such is not the case now.

Costello v. Grand Trunk R.W. Co. (1906), 7 O.W.R. 846, was a case in which the plaintiff had signed a special contract for shipment; and he was held bound by it. So, too, *Robertson v. Grand Trunk R.W. Co.*, 24 S.C.R. 611. *Coombs v. The Queen* (1896), 26 S.C.R. 13, simply decides that when a person buys a railway ticket the contract is for a continuous journey, and he

cannot insist upon going part of the way at one time and part at another. It is true that an additional reason was by the Court given why the plaintiff could not succeed, i.e., he had a plain warning on the ticket itself.

None of these cases does and none of them can overrule the decision of the House of Lords in *Henderson v. Stevenson*, L.R. 2 H.L. Sc. 470. There the plaintiff had taken from the defendants a ticket from Dublin to Whitehaven; on the face of the ticket were the words "Dublin to Whitehaven" and letters indicating the name of the defendants; on the back a special provision as to liability, which the plaintiff did not read. The case is one in the Scottish Courts, but the law of England and the law of Scotland are the same so far as this case is concerned (*Harris v. Great Western R.W. Co.*, 1 Q.B.D. 515, at p. 528, *per* Blackburn, J.). The Lord Chancellor, Lord Cairns, agrees "entirely with the observation of the Lord Ordinary in the present case, where he says in his note: 'It has not been shewn that the Pursuer's attention was called either to the bills in the office or to the notice on the back of the ticket, or that he knew either of the one or of the other. There is no reason to doubt the Pursuer's word when he says he never read the conditions on the back of the ticket. Now it seems fixed that, in a case like this, mere notice not brought home to and assented to by the Pursuer is not enough.'" And the Lord Chancellor adds: "Can it be held that when a person is entering into a contract containing terms which *de facto* he does not know, and as to which he has received no notice, he ought to inform himself upon them? My Lords, it appears to me impossible that that can be held." Lord Chelmsford, after discussing the duty of the defendants as common carriers, says at p. 477: "I think that such an exclusion of liability for negligence cannot be established without very clear evidence of the notice having been brought to the knowledge of the passenger, and of his having expressly assented to it. The mere delivery of a ticket with the conditions indorsed upon it is very far, in my opinion, from conclusively binding the passenger. . . . The com-

pany undertake to convey passengers in their vessels for a certain sum. The moment the money for the passage is paid and accepted, their obligation to carry and convey arises. It does not require the exchange of a ticket for the passage-money, the ticket being only a voucher that the money has been paid," etc.

Lord Hatherley, at p. 478, says: "Now he entered into a contract as a passenger for the conveyance of himself and his luggage from Dublin to Whitehaven. In the absence of any restriction, assented to by him, to his right, he was entitled to consider himself as assured of that passage . . . They delivered to him a ticket, he having, in the first place, paid his money for the passage from Dublin to Whitehaven. I agree . . . that the money having been paid, and the ticket having been taken up, a contract was completed upon the ordinary terms of conveyance for himself and his luggage, unless it can be made out that he had entered into any special contract to the contrary."

Lord O'Hagan, at p. 481, says: "When a company desires to impose special and most stringent terms upon its customers, in exoneration of its own liability, there is nothing unreasonable in requiring that those terms shall be distinctly declared and deliberately accepted. . . ."

This case was followed in *Bate v. Canadian Pacific R.W. Co.* (1889), in the Supreme Court, 18 S.C.R. 697, reversing the decision of the Court of Appeal, 15 A.R. 388.

In *Richardson v. Rowntree*, [1894] A.C. 217, a ticket was bought from Philadelphia to Liverpool. The ticket contained a number of conditions which the plaintiff did not read. The jury found that the plaintiff knew that there was writing or printing on the ticket, that she did not know that such writing or printing contained conditions relating to the terms of the contract of carriage, and that the defendants did not do what was reasonably sufficient to give her notice of the conditions. Upon these answers it was held that the plaintiff was not bound by the conditions. The facts were "that the

plaintiff paid the money for her passage for the voyage in question, and that she received this ticket handed to her folded up by the ticket clerk, so that no writing was visible unless she opened and read it. . . . Nothing was said to draw her attention to the fact that the ticket contained any conditions." Lord Watson, in concurring, added: "It appears to me that there was ample material for a finding by the jury on all these three issues, and I am at present inclined to think that they found rightly upon them all."

From the authorities it seems clear that even in the case of a ticket being handed to an intending customer of a common carrier, which contains conditions limiting the liability of the carrier, the conditions do not become by that fact alone binding upon the customer. The very highest at which the rights of the carrier can be put is that if the customer has (a) read the conditions, or (b) knows that the ticket contains conditions and abstains from reading them, or (c) if the circumstances are such that he must be held to know that the ticket contains conditions, as, *e.g.*, if the carrier has done all that is reasonably necessary to give the customer notice that the ticket contains conditions, or the journey is of such a character that any reasonable man would know that there must be conditions—then the carrier may avail himself of the conditions.

I do not think that the defendants have succeeded in this case in proving the least they must prove. (a) Horn did not read the receipt; did not see any writing on it; looked at it in the same way he would look at a paper he was handed; he had seen the defendants give receipts over and over again. (b) Nor is there a tittle of evidence that Horn knew that the paper contained conditions. (c) The receipt was not handed to him at the time he paid; it apparently would never have been handed to him at all if he had not bethought himself that he was acting for another and asked for a receipt for the trunk. The paper was handed to him in response to his request for a receipt for the trunk, and not at all as a special contract or as containing

the terms upon which the trunk would be accepted for transfer and the money for payment—the trunk was already in the possession of the defendants for transfer, and they had taken off the steamer check and the money had been paid a quarter of an hour before. There were no circumstances which would induce a reasonable man, then at least, to think that the receipt contained special conditions (at least not if I am a reasonable man—I am sure I have handed my checks to the servants of this company and received receipts a dozen times without having any thought that the paper I received contained conditions). There was absolutely nothing done by the defendants to draw Horn's attention to the special conditions, or to the fact that there were special conditions or any conditions.

Then it is argued that the agents of the defendants had no authority to enter into any but the contract evidenced by the "receipt;" and *Harris v. Great Western R.W. Co.*, 1 Q.B.D. 515, and the remarks of Blackburn, J., at pp. 533-4, are referred to. However the case may be where the master is other than a common carrier—and it were useless to enter upon a discussion of the general principle—it seems clear that such a company as this are bound by a contract of the agent whom they put forward as having the management of that part of their business: *Pickford v. Grand Junction R.W. Co.* (1844), 12 M. & W. 766; *Heald v. Carey* (1852), 11 C.B. 977; *Winkfield v. Packington* (1827), 2 C. & P. 599.

I have said nothing about negligence; but it is hard to see how the conduct of these defendants is consistent with care. No theory is advanced for the disappearance of the trunk, and it does not seem to be a prudent system which permits the sudden vanishing of such an article.

Upon the whole I am of the opinion that the judgment entered by the Chancellor in the trial Court for the defendants should be set aside and judgment entered for the plaintiff for the amount proved, viz., \$487.35, and that the defendants should pay the costs, including the costs of this appeal.

I would repeat that I think it would be an unfortunate thing if the result were different—and, if the result should be different, the fact cannot be too well known—travellers should know that those soliciting baggage to be transferred do not intend and cannot be made to pay for it, if it disappears while in their custody.

The defendants appealed to the Court of Appeal, and the appeal was argued on the 26th and 27th January, 1909, before MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

G. H. Watson, K.C., and *B. N. Davis*, for the defendants, contended that the evidence shewed that, as stated in the judgment of the trial Judge, the general course of the defendants' business was to take the baggage with restricted liability, and they relied on the condition contained in the contract made by them with the plaintiff, by which it was stipulated that they should not be liable for any loss or damage to the trunk for over \$50, and the defendants' servants had no authority to make any other contract. The plaintiff was bound by the acts of his agent, Horn, who is found by the trial Judge to have been familiar with the defendants' mode of transacting business, and the nature of the receipt given by them. The trial Judge also finds that there is no evidence of any unconditional contract by the defendant company, and on these findings the law is clearly in their favour. The defendants rely on the reasonings set forth in the judgments of the Chancellor, and of MacMahon, J., and on the authorities cited therein.

R. S. Robertson, for the respondent, argued that on the evidence the whole matter was at an end so far as Horn's agency was concerned, when he paid the fee and handed over the check for the trunk, and the defendants cannot escape liability through his subsequent act in returning for the receipt, which was done on his own account, and not as agent for the plaintiff. The authorities relied on by the plaintiff are set out and discussed in the judgment of Riddell, J.

Watson, in reply.

May 5, 1909. Moss, C.J.O.:—The defendants appeal from the judgment of a Divisional Court reversing, by a majority, the judgment of the trial Judge, who dismissed the action, and awarding the plaintiff judgment for the value of a trunk and its contents carried by the defendants for hire and lost by them.

There is nothing in the pleadings or otherwise to prevent an examination of the actual facts as proved at the trial, or the ascertainment of the position of the parties towards each other as appearing in the evidence.

The terms of the defendants' charter of incorporation, as well as the testimony given on their behalf, shew that the defendants are common carriers. They are exercising a public employment and undertake to carry and deliver (among other things) baggage or luggage for customers to and from railways, steamboats, and other public conveyances.

And of this opinion was the learned trial Judge, who said (*ante*, p. 292): "The defendants are, no doubt, in the position of common carriers, and they have become incorporated under the general Dominion statute for the purpose of carrying on a baggage transfer company."

Further on (*ante*, p. 293) the learned trial Judge stated the law applicable to persons in the position of common carriers as follows: "The law is that a common carrier who gives no notice limiting his liability is an insurer of the property received; but, if he gives notice, which is brought home to the customer, that he will be liable only to a limited extent, he ceases to be an insurer beyond that limit."

The onus is on the carrier to prove that he has brought home to the customer notice limiting the liability.

The defendants admit the receipt by them of the trunk and its loss, but do not seek to escape from all liability. They set up notice to the plaintiff of a stipulation or condition limiting their liability to \$50.

And the question is, whether they have proved that there was incorporated in the contract between the plaintiff and them a

stipulation, express or properly implied, the effect of which was to limit the defendants' liability. The answer depends on whether the defendants have brought home to the plaintiff notice of the condition printed on the "receipt" for his trunk, which the plaintiff has in his possession. The condition limits the defendants' liability to \$50, but ought the plaintiff to be held to be aware of and to have accepted the condition as a part of the contract for the carriage and delivery of his trunk?

It may be assumed that, if the defendants had been able to prove that at the time of the delivery of the trunk to the defendants and the payment of the twenty-five cents charge for its carriage to and delivery at 53 Robert street, the "receipt" had been given to and received by the plaintiff's father-in-law, or by Horn, both of whom acted for him in transferring the trunk to the defendants' custody, it would not have been necessary for them to have gone further in the way of affecting the plaintiff with notice of the condition.

But that was not this case. The "receipt" was not delivered contemporaneously with the assumption by the defendants of the custody of the trunk and the receipt of the charge for carriage and delivery. That being the case, the defendants were not entitled to rely upon the mere after-taking of the receipt as sufficient. They were called upon, under the circumstances, to shew either that they took other steps beyond mere delivery of the receipt to draw attention to its special nature, or that, in some reasonable way, knowledge of the condition was brought home to the plaintiff, who accepted it as a term of the contract.

Actual knowledge of the existence of the condition cannot, upon the evidence, be imputed to the plaintiff, his wife, or any of those concerned in his behalf, nor is there any good reason for inferring that any one of them supposed or believed that the defendants' course of doing business for the travelling public was subject to any special condition respecting the liability of the defendants in case of loss or damage to the property they undertook to carry.

The utmost that appears is that Horn knew that the defendants were in the habit of usually giving receipts, but he was not aware of their form or contents.

The defendants have failed to shew a special contract taking them, as respects liability for loss, out of the ordinary rule, and the appeal fails.

GARROW, J.A.:—Appeal by the defendants from the judgment of a Divisional Court, varying the judgment at the trial before the Chancellor, who found in favour of the plaintiff, but limited the damages to \$50, which were increased by the Divisional Court, MacMahon, J., dissenting, to \$487.35.

The defendants do not dispute their liability up to the \$50, but contend that by a condition contained in the receipt their liability is limited to that sum, as was held by the learned Chancellor.

The condition is printed on the face of the document and is not at all ambiguous or difficult to understand. And if it had been handed to Mr. Horn when he paid over the twenty-five cents as the price of the cartage, the conclusion would be irresistible that he, on behalf of the plaintiff, had accepted the special contract. And this would probably be so whether in fact he had, or had not, read or become aware of the contents of the receipt. His duty would be to read a document so constructed and so presented, as evidencing the terms on which the defendants proposed to undertake what was required of them.

But what difficulty there is, is, I think, created by the special circumstances, which require careful attention. Horn did not in fact read the receipt. Nor did the plaintiff until about ten days after the event, when about to make a claim. Horn, who is a Customs officer, knew that it was customary for the defendants to give receipts, but he was not asked, nor did he say that he had any knowledge of the usual contents of such receipts. He was merely acting in the matter for Mr. Riddy, the plaintiff's father-in-law, who had handed the check and the cartage money

to him to deliver to the defendants in order to have the trunk forwarded to the plaintiff's address in Robert street. There was nothing in the circumstances to suggest to him anything in the nature of a limited or special contract of any kind. At first the defendants' agent, Dunn, was apparently willing to send the trunk without charge, "O.K.'d" as it was called, probably because of Horn's position in the Customs, although the reason is not stated, I think, but Horn said it was for Mr. Riddy and that he had left twenty-five cents to pay for the cartage. He then paid Dunn the money and give him the check, and at once went away without having been offered a receipt, and the transaction seemed for the time closed.

Had the matter thus remained, the defendants' unlimited liability would have been beyond doubt. Their agent had accepted the bailment and had been paid the price agreed upon. Under the circumstances, the doubt, for after all it is only a doubt, expressed by Blackburn, J., in *Harris v. Great Western R.W. Co.*, 1 Q.B.D. 515, at p. 533, quoted with approval by the learned Chancellor, can have no application.

But Horn after an absence of about fifteen minutes returned and demanded a receipt, and was then handed the document now in question. By that time the defendants had taken possession of the trunk, and had had it "stripped," that is, had taken off the regular check and attached their own ticket of transfer. What would have been the consequence if Horn had then read the document, or been informed of its contents, need not be considered. If he had read it and disapproved of the condition, he might doubtless have reclaimed the trunk, or if having read it he had expressed no disapproval, it might well be the proper inference that he accepted it as expressing the true contract, by which the plaintiff as his principal would be bound. But he did not read it or otherwise become aware of its contents. And the real question is, ought knowledge to be imputed to him under the circumstances?

This is a pure question of fact, and, in my opinion, the reasonable inference is the other way. He had already made an

unconditional contract after having been offered free cartage. He came back, not to get a new or different contract, but a mere receipt. That was what he asked for, and he might under the circumstances fairly and without negligence assume without reading it that he was merely getting what he had asked for and nothing more. If he had not come back no question could have been raised as to the defendants' liability, and the burden is of course upon them to shew that the new contract was substituted, with the plaintiff's consent, for the old, and in this they, in my opinion, fail.

Efforts have been made from time to time to have similar inferences regarded as inferences of law, and not of fact, but the current of authority is, I think, otherwise. As an instance see *Watkins v. Rymill*, 10 Q.B.D. 178, but that case in *Robertson v. Grand Trunk R.W. Co.*, 24 S.C.R. 611, at p. 617, is considered to be in conflict with *Henderson v. Stevenson*, L.R. 2 H.L. Sc. 470, and the more recent case of *Richardson v. Rowntree*, [1894] A.C. 217. See also *Bate v. Canadian Pacific R.W. Co.*, 18 S.C.R. 697, as explained in the *Robertson* case at the page before referred to (617); *Parker v. South Eastern R.W. Co.*, 1 C.P.D. 618, and in appeal, 2 C.P.D. 416.

In *Henderson v. Stevenson* the condition was wholly printed on the back of the ticket. In *Parker v. South Eastern R.W. Co.*, on the face of the receipt there were the words "see back," and on the back was the condition.

But, so far as appears, the condition in *Richardson, Spence & Co., etc., v. Rowntree* was written or printed on the face of the ticket, but the ticket itself was so folded as that no writing or print appeared without opening it. So that it is, I think, fair to say that the result of the cases is to shew that the determining factor is not, whether the condition is on the back or upon the face of the contract, but whether, from all the circumstances of the case as disclosed in the evidence, the plaintiff knew or ought to be assumed to have known of the limiting conditions. In the *Richardson* case the questions

submitted to the jury and approved in the House of Lords were: (1) Did the plaintiff know that there was writing or printing on the ticket? This was answered in the affirmative. (2) Did she know that the writing or printing on the ticket contained conditions relating to the terms of the contract of carriage? This was answered in the negative. (3) Did the defendants do what was reasonably sufficient to give the plaintiff notice of the conditions? This was also answered in the negative.

And in this case, if similar questions had been submitted to me as a jurymen, I would, upon the evidence and without hesitation, have answered them in the same way.

The appeal, in my opinion, fails, and should be dismissed with costs.

OSLER and MACLAREN, JJ.A., concurred.

MEREDITH, J.A.:—There has already been an exceptional diversity of judicial opinion in this case, for which, however, it may not be difficult to account. We have all, more or less, a personal interest in the subject matter of the litigation. We have all more or less frequently occupied the position of the plaintiff as a contractor with the defendants for the carriage by them of our luggage, and though perhaps none of us has been as unfortunate as he was in having had his luggage altogether lost, I for one feel bound to plead guilty of having, more than once, experienced a loss of temper over delays in the delivering of luggage which, perhaps in haste and without a full knowledge of all the circumstances or a due consideration of them, seemed exasperatingly needless. Unconscious personal interest is very apt to misguide any one.

The trial Judge found all the material facts in favour of the defendants, and dismissed the action; one of the Judges of the Divisional Court approved of such findings and conclusion; another of them found in favour of the plaintiff upon the narrow ground that the writing in question had no effect because

it was not delivered until a short time—some fifteen minutes—after the time when, as he found, a contract had been made; whilst the third of such Judges was feelingly in favour of the plaintiff all along the line.

The question involved being one of fact—whether a question for Judge or jury is at the moment not material—and of a fact to be found more from the acts than from the words of the parties, affords another reason for such diversity of opinion; whilst a third arises from the lack of exact uniformity in the decisions, and in the expressions of opinion, in the authorities, which are well collected and commented upon in the case of *Watkins v. Rymill*, 10 Q.B.D. 178, by the late Mr. Justice Stephen.

I am quite unable to accept the narrower view of the case, given effect to, as I have said, by one of the Judges of the Divisional Court. It seems to me impossible to sever completely the giving and acceptance of the writing from the transaction, and to treat it as having no sort of effect upon the contract. The writing was asked for and was given as evidence of the defendants' responsibility, that is, of their contract. It is idle to say that it was asked for and given merely to shew that the man entrusted with the making of the contract had given the sum of money needed for that purpose, had not misappropriated it to his own use. It was given to and accepted by him as that which would also place the proper responsibility upon the proper shoulders if there should be any miscarriage; for that purpose it was retained and soon afterwards handed on to the intermediate agent, and by him eventually to the principal, and for the like purpose was retained by him, and from that time on used by him in his demands upon the defendants for the delivery of the luggage, or compensation for its loss, as his evidence of their responsibility for it; and indeed is thus stated in the statement of claim in this action: "4. Afterwards the said Customs House officer delivered the said baggage check and trunk to the defendants and received from them a receipt check No. 47975, for which the charges, 25c., were duly paid to the defendants or their

agent; . . . 7. The plaintiff never authorized the said Customs House officer to enter into any agreement with conditions as set forth in the said receipt of the defendants, and never assented to any such contract being entered into on his behalf": not that such an agreement was in fact never made. Besides all this, before action brought, a claim of \$800 for the loss of the luggage was made by the plaintiff's Chicago attorney-at-law, upon this receipt; and a subsequent claim for \$500 by his Toronto solicitors, in the like manner. It is not unimportant that the intermediary was the plaintiff's father-in-law, to whose house the luggage was to be sent, and with whom the plaintiff and his wife were to stay, for when the document came to his hands it was substantially at home. This somewhat—if I may use the expression—slim ground of defence was therefore an afterthought, arising apparently for the first time in the Divisional Court.

Upon the broad question, what was the actual contract between the parties, we must start at the beginning. We must have regard to the actual position of each of the parties in regard to such a transaction at the time it took place. It will not do to jump to the conclusion that the defendants were common carriers, and that the plaintiff's intention was to deal with them as such without any sort of limitation to their common law liability as such carriers.

I assume, however, that the defendants were common carriers, and that, in the absence of a special agreement limiting their liability, they would be answerable in damages to the plaintiff in the full amount of his claim; but, at the same time, it is clear upon the evidence that it was their invariable rule that their liability upon contracts, for the carriage of such luggage as that in question for the charge of twenty-five cents, should be limited to fifty dollars; and that none of their servants or agents had any actual authority to enter into such a contract except with such limitation of liability.

On the other hand, the plaintiff was a resident of Chicago, and a man who travelled a good deal, and one who could not but be

aware of the common, if not universal, practice of limiting liability on contracts for the carriage of luggage. He was just returning from a long journey in which his luggage must have been "checked" many times, and he must generally have been in the habit of having luggage "checked," and, being a business man, he could hardly have helped observing upon his "checks" such limitations of liability. It is hardly likely that any "check" or receipt ever obtained by him did not contain such a limitation. The "check" of the navigation company, which was handed to the defendants when the contract in question was made, doubtless contained such a limitation. Why then should the plaintiff expect or intend to enter into an unlimited contract with the defendants? My finding, upon the whole circumstances of the case, would, in that respect, be, that the plaintiff expected and intended to enter into the usual contract, and not to enter into an exceptional one giving him greater rights than those which the public generally acquired in like contracts for the like services at the like price. He nowhere even suggests that he knew anything about common carriers or their common law liability, or that he intended to enter into any sort of a contract different from those which he was in the habit of making for the carriage of his luggage, or different from that provided for in the navigation company's "check" which he was about to exchange, in effect, for one of the defendants'.

Then his agent, having no instructions to the contrary, proceeded to make the contract in the usual manner, and at his request received the usual evidence in writing of that contract. Having asked for it, as I have before mentioned, as evidence of the defendants' responsibility, and having received it as such, why should not its terms be binding, it being in fact the usual form of contract and the only one which the persons, who made the contract in the defendants' behalf, had any power from the defendants to make? Having asked for the evidence, and having had it prepared and handed to him, the defendants are hardly blameable if he did not choose to read it. They, in effect, said to him, these are the terms of our responsibility; and they were plainly

printed in a few words on the face of the document. It was not the case of a ticket issued in a hurry, where there was no reasonable opportunity of reading it because of the urgency of others to purchase their tickets, or of a bad light, or bad print, or inability to read. The man had it in his possession for fifteen minutes with abundant opportunity for fully digesting all its contents. Had he read it, what would have been the result? Probably nothing, for he would have seen that it was in the usual form, the same as every one else got; whilst, if he had objected or enquired, the result would have been the same, he would have been informed that it was the usual receipt and the only receipt they could give. Then the receipt was handed on to the plaintiff's father-in-law and taken by him as the proof of the defendants' responsibility, and used as such by him and his daughter, the plaintiff's wife, and by the plaintiff, yet none of them at any time repudiated it until this action was brought, and then only on the ground that the man who made the contract had no authority to make such a contract for the plaintiff; a contention which is not founded in fact, for the agent's power was not limited, and, indeed, it was, as I have said, the intention of the plaintiff that the usual contract should be made. If, in no sense misled by the carrier, the owner of the luggage could abstain from reading the evidence of the contract which the carrier intended to enter into—such contract being a reasonable and usual one—placed in his hands as evidence of the contract, and thereby get the benefit of a contract the carrier did not intend to enter into, and would not for the same money have entered into, an injustice would be done. It would also be unjust if the careful man would be bound because he was reasonable enough to read the document, whilst the careless man would be accorded higher rights because he was unreasonable enough not to read it.

There is no difficulty in finding, as I do, that, had the man who received it read the document, or had the plaintiff, his wife, or his father-in-law, first received it and at once read it, no objection would have been made, each would have known, or seen, that it contained only a usual, if not reasonable, condition limit-

ing liability, and would have accepted it without demur, just as their habit had been to receive "checks" of a like character; and that, even if objection had been made, there would eventually have been acquiescence rather than incur the additional expenses of some other means of taking their luggage home with them. It is quite plain that the defendants would not have contracted for unlimited liability, and I think it equally clear that the plaintiff would not have adopted the alternative of paying a cabman double or more than double the price of the carriage of the luggage. To prove this it does not need the fact that neither the plaintiff nor his solicitors, after not only reading but carefully studying the plaintiff's position with a view to making a claim against the defendants, objected in any way to the form of the writing, but with that fact it seems to me to be undeniable that no objection would have been made if the document had been read by any or all of the persons mentioned at the time it was obtained, or, at the least, that it would ultimately have been accepted.

We are not directly concerned with any question of the reasonableness or unreasonableness of the condition in question; but indirectly it may bear upon the questions of fact involved in the case; it may more or less affect the probabilities; and therefore it may be proper to say that there is, in my opinion, nothing unreasonable in the defendants fairly limiting their liability for luggage carried and delivered in any part of the city of Toronto for twenty-five cents each large piece. It may be that the limitation ought to be \$100 and not \$50, for it is not improbable that the average value of the contents of all the luggage carried by the defendants would not very greatly exceed \$100 in each piece; and, where luggage of exceptional value is given into their charge, the very plainest of fair play requires that they should be made aware of the fact, and be paid an additional sum for its carriage, if they are to be also insurers of it. On the other hand, it was, as it seems to me, very unreasonable of the plaintiff to have given the luggage in question into the defendants' charge without making them aware of the fact that it contained clothing of exceptional value, and such as it is most unusual to carry

about at the season of the year when the transaction in question took place—mink furs in the end of June—unless the plaintiff expected them to be carried at his own risk.

It is not necessary for me to consider whether the condition in question covers loss arising from the defendants' negligence; because the trial Judge has found that loss through negligence has not been proved, and I am unable to say that his finding in that, or indeed in any, respect was wrong. One of the learned Judges has asked, what could the cause of the loss be if it were not negligence? But that is not a difficult question. One obvious answer is, theft, against which even the most careful of us are sometimes unable to guard. If the plaintiff, or his wife, had happened in any way to disclose the fact that the not very large piece of luggage in question contained valuable furs, and that its contents were worth "\$800," or even "at least \$500," in the hearing of any clever thief, from whose presence neither the docks of Toronto nor the navigation company's vessels have complete immunity, it is by no means an extraordinary thing that the luggage vanished and that no honest man can tell whither it went.

It therefore seems to me, that, for these reasons, the judgment at the trial should not have been disturbed and should now be restored: (1) Upon a question of fact, the true finding of which was much more difficult in the Divisional Court than at the trial, the trial Judge found in favour of the defendants, and that finding ought not to have been reversed unless plainly shewn to be wrong; that has not been done. Some of the recent cases upon the subject of a court of appeal disturbing findings of fact at a trial are set out in the recent case of *Re Blye and Downey*—not reported—and need not be repeated here. The advantages of a trial Judge, in more ways even than in the very important matter of seeing and hearing the witnesses, are constantly referred to and are very obvious, whilst the disadvantages of a court of appeal, in having before it only that which has been gracefully described as the dead body of the evidence, and which might often as truly, though inelegantly, be described as its mutilated remains, ought

to be equally obvious, and must be unless one is quite too self-confident; (2) If the case had to be determined upon such evidence, without the aid of anything determined at the trial, my finding would be, that the plaintiff accepted the condition limiting the amount of the defendants' liability; And (3) the judgment pronounced at the trial is quite in accord with the later cases and the present trend of judicial opinion, and in no way in conflict with anything that was decided by the House of Lords in the Scotch case of *Henderson v. Stevenson*, L.R. 2 H.L. Sc. 470.

NEGLIGENCE—WORKMEN'S COMPENSATION ACT.

ONTARIO.]

[COURT OF APPEAL.

GIOVINAZZO V. CANADIAN PACIFIC R.W. CO.

(19 O.L.R. 325.)

Master and Servant—Injury to and Death of Servant—Workmen's Compensation for Injuries Act—Notice Prescribed by sec. 9—Reasonable Excuse for Failure to Give—Administrator—Right to Give Notice before Issue of Letters—Ignorance of Law—Negligence—Workman Run over by Train in Railway Yard—Findings of Jury—Licensee—Statutory Duty—Defective System—New Trial—Ground not Alleged in Pleading.

Section 9 of the Workmen's Compensation for Injuries Act, which requires notice of the injury to be given, provides that the notice must be given within twelve weeks after the occurrence of the accident causing the injury, and that in the case of death the want of notice shall not bar the action which the Act gives, if the Judge is of opinion that there was "reasonable excuse" for the want of notice:—

Held, that ignorance of the law is not a "reasonable excuse;" and in this case the plaintiff, the brother of the deceased person who was injured, might have given the notice before he was appointed administrator, and his solicitor's mistaken idea to the contrary did not excuse the want of the notice; and the action therefore failed.

Judgment of a Divisional Court reversed.

The deceased was employed by the defendants as a workman on the tracks in a railway yard, and, when crossing the tracks with other workmen on his way home from work, was struck by an engine and killed. The negligence alleged was that the engineer in charge of another engine in the yard let off a large quantity of steam, which prevented the deceased from seeing or hearing the engine which struck him. The jury found that the defendants were guilty of negligence by blowing off steam or hot water at such a critical moment with such a large number of em-

ployees between the tracks; that the deceased came to his death by reason of the negligence of a person in charge of an engine of the defendants, such negligence consisting in blowing off steam or hot water, and that a proper look-out was not kept in a proper place on both engines when backing; and that there was no contributory negligence. On these findings the trial Judge entered judgment for the plaintiff:—

Held, by the Divisional Court, that the position of the deceased, in view of clause 5 of sec. 3 of the Workmen's Compensation for Injuries Act, was, in the absence of any finding to the contrary, that of a mere licensee; that he could not claim the benefit of sec. 276 of the Dominion Railway Act, because the engine was not passing over or along a highway at rail level; but that the deceased might have had cause to complain of a defective system, within the meaning of clause 1 of sec. 3, from the facts developed in the evidence, although not specifically mentioned in the pleadings; and a new trial was ordered, with leave to amend.

The Court of Appeal, reversing the judgment upon the other ground, did not, as a Court, express an opinion upon these points.

But, *semble*, *per* OSLER, J.A., referring to *Willett v. Watt & Co.*, [1892] 2 Q.B. 92, that the discretion of the Court below in allowing the plaintiff to make a new case, after the time had elapsed within which a new action could be brought, should not, on that ground, be interfered with.

Semble, *per* GARROW, J.A., that the true position of the deceased at the time of the accident was not that of a mere licensee, but of a person upon the defendants' premises by their invitation, and one to whom the defendants owed a duty to take reasonable care that he should not be injured.

And, *semble*, *per* MEREDITH, J.A., that there was no proof of any negligence on the part of the defendants; and the granting of a new trial in order to enable the plaintiff to set up an entirely new case was contrary to proper practice.

APPEAL by the defendants and cross-appeal by the plaintiff against an order of a Divisional Court granting a new trial, on appeal by the defendants from the judgment at the trial in favour of the plaintiff in an action by him, as administrator, to recover damages caused by the death of his brother Michele Giovinazzo, which was said to have been caused by the negligence of the defendants.

The action was tried before CLUTE, J., and a jury, at Toronto, on the 24th and 25th September, 1908, and, after certain questions had been answered by the jury, the trial Judge delivered judgment in favour of the plaintiff for \$600 and costs.

From this judgment the defendants appealed to a Divisional Court, and the appeal was heard by MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ., on the 23rd November, 1908.

I. F. Hellmuth, K.C., for the defendants.

H. L. Dunn, for the plaintiff.

December 23, 1908. The judgment of the Court was pronounced by MEREDITH, C.J.:—The action is brought by the respondent as administrator of the personal estate of Michele Giovinazzo, deceased, to recover damages for the killing of the intestate, who was an employee of the appellants, owing to their negligence.

The acts of negligence complained of as set out in the statement of claim are in substance that on the 18th September, 1907, the deceased was employed by the appellants as a workman on the tracks of their railway in their yard at Toronto Junction; that when the deceased was proceeding home from his work across the tracks of the yard, a locomotive came along one of the tracks, and, just as the deceased and his companions crossed the track in front of the locomotive, the engineer in charge of it caused it to let off with a loud, hissing noise, a large quantity of steam; that this steam "formed a dense cloud and completely enveloped the deceased and prevented him from hearing locomotives or cars approaching on other tracks near him, and from seeing in what direction he should go to avoid being struck;" and that while he was in this situation another locomotive "came along, moving backwards in the same direction on another track," close to the other track, and knocked the deceased down and so injured him that he died on the following day.

The specific negligence charged is:—

1. That no person was stationed on the tender of the locomotive which struck the deceased to give warning of its approach, and that no signal of its approach was given by bell, whistle, or otherwise.

2. That the engineer in charge of the other locomotive improperly and unnecessarily caused it to let off the steam just as the deceased and his companions crossed the track in front of the locomotive.

The claim is made both under the Workmen's Compensation for Injuries Act and the common law.

The appellants in their statement of defence, besides denying the allegations of the statement of claim, plead the want of the notice prescribed by sec. 9 of the Act.

Neither in the statement of claim, nor by any subsequent pleading, does the respondent set up any ground for excusing the failure to give the statutory notice.

The action is brought on behalf of the father and mother of the deceased, both of whom reside in Italy, and the respondent is a brother of the deceased.

Upon the argument two objections which, as contended, were fatal to the respondent recovering, were relied on:—

1. That no actionable negligence was proved.
2. That there was nothing shewn to dispense with the necessity of the statutory notice.

Dealing first with the second of these objections, the facts are that the deceased had no relative in America but the respondent, who at the time of the accident was working on a railway near Kenora; that, having heard of the death of his deceased brother, he wrote to the Italian consul for the purpose of ascertaining if the report of the death was true, and received word from him on the 7th November that it was true; that the respondent then waited for his pay, which was delayed, and when it was received proceeded to Toronto, arriving there on the 5th December; that he there, on the following day, saw the consul for the purpose of learning the particulars of his brother's death, and the name of a lawyer to whom he should go; that, having received the desired information, and on the same day, he consulted Mr. Dunn, of the legal firm who are his solicitors in the action, and instructed him to ask the appellants for a settlement, and left the case in his hands; that after learning of his brother's death, the respondent wrote to Italy, presumably to his father or mother, and, as he says, got instructions from them to bring an action on the 8th November, four or five days after he set out for Toronto; that the solicitor advised

him that letters of administration must be taken out; that there was some delay in arranging for the giving of the administration bond, but that the papers were executed on the 19th December and filed in the Surrogate Court on the 21st December, and the grant of the letters of administration was made on the 30th of that month; that on the 13th January following, the solicitors obtained a copy of the proceedings at the inquest which had been held upon the body of the deceased; that conferences with the consul and an interpreter followed throughout January, and that on the 26th February notice of the accident was given to the appellants.

Mr. Dunn accounted for the delay in giving the notice, or some of it, by saying that he was under the impression that until the letters of administration were obtained the notice could not be given.

During the course of the argument at the trial, when this objection was raised, the counsel for the appellants, after my brother Clute had observed in answer to an argument of his, "but he took prompt action in getting letters, he gave bondsmen," replied: "I do not want to press this matter unduly against a fellow practitioner."

My brother Clute eventually ruled that there was reasonable excuse for the want of notice.

Section 9, which requires notice of the injury to be given, provides that the notice must be given within twelve weeks after the occurrence of the accident causing the injury, and that in the case of death the want of the notice shall not bar the action which the Act gives, if the Judge is of opinion that there was reasonable excuse for the want of notice.

The twelve weeks expired on the 12th December (the accident having happened on the 19th and not on the 18th September, as stated in the pleadings).

The position of matters on the 12th December was that the necessary documents for obtaining letters of administration had not been completed, owing, however, to no neglect or delay on

the part of the respondent or of his solicitor, both of whom were then apparently not informed of the circumstances under which the accident had happened, though the appellants must have been aware of them from the first, as an inquest was held.

Any delay after the 12th December is not, in my opinion, to be considered. The notice, to be effective, must be given within the twelve weeks, and the only question for the trial Judge was whether there was a reasonable excuse for not giving it within that period.

That the decision of the trial Judge is open to review upon appeal is settled; and it is also settled by decisions binding upon us, that neither ignorance of the necessity of giving the notice, nor the knowledge by the company of the accident, standing alone, is a reasonable excuse for not giving the notice, within the meaning of sec. 9. Both or either of these may, we think, be regarded as elements of the excuse, but "something more is required, whether personal to the individual injured or to the employer, or to both:" *per* Osler, J.A., in *O'Connor v. City of Hamilton* (1905), 10 O.L.R. 529, at p. 536; and, as was said by the same learned Judge in *Armstrong v. Canada Atlantic R.W. Co.* (1902), 4 O.L.R. 560, at p. 568, "What may constitute reasonable excuse for not giving notice is not defined, and must depend very much upon the circumstances of the particular case."

The circumstances of this case, as I have detailed them, are peculiar, and in our opinion warranted the learned trial Judge in holding that there was reasonable excuse for not giving the notice. The deceased was a foreigner, having no relation in America but the respondent, who, having no pecuniary interest in the continuance of his life, had no right of action against the appellants; he was also a foreigner, and was working many hundred miles from the place at which the deceased was killed; he had no knowledge of the circumstances under which the death had happened, and did not even know that the report of his brother's death was true until the 7th November. The father and mother, who were the only persons having a right of

action, resided in Italy; with them the respondent promptly communicated as soon as he learned that his brother was dead, and did not obtain authority to act for them until four or five days after he left Kenora for Toronto. The date when he left Kenora is not stated, but he reached Toronto on the 5th December, and immediately put himself in communication with the Italian consul there; being advised by him to do so, he on the following day saw a solicitor and gave instructions to him to obtain letters of administration of his brother's estate; there was no unreasonable delay in obtaining the letters of administration, and they were granted on the 30th December. Up to this time the circumstances under which the death occurred were apparently not known to the respondent, for on the 13th January his solicitor obtained a copy of the proceedings at the inquest, presumably in order to possess himself of that knowledge; and, in addition to all this, the solicitor was of opinion that until the respondent was clothed with administration of the deceased's estate he could not give the requisite notice.

It may be that as the delegate of his father and mother, he might have given the notice, but he could not have given it in any other capacity until the grant of the letters of administration had been made.

As I have said, these circumstances were, in our opinion, sufficient to warrant the ruling of the trial Judge, or, at all events, we cannot, having regard to them, say his ruling was wrong.

It is further to be observed that the counsel for the appellants, at the trial, if he did not actually give up the objection based on the want of notice, at least indicated to the trial Judge that if his opinion was against his contention, he would acquiesce in that opinion.

There is more difficulty in dealing with the other objection, in view of the findings of the jury that the negligence with which they found the appellants were chargeable was "blowing off steam or hot water at such a critical moment with such a large number of employees between the tracks," and also be-

cause "a proper outlook was not kept in a proper place on both engines when backing," and of the fact that there is no finding of any fact from which an inference can be drawn that the defendants owed any duty to the deceased that steam or hot water would not be blown off where that was done, or to keep the look-out which they find was not kept.

The respondent's case can not, we think, be supported under the provisions of clause 5 of sec. 3 of the Workmen's Compensation for Injuries Act, the provisions of which are that "where personal injury is caused to a workman . . . 5. By reason of the negligence of any person in the service of the employer who has the charge or control of any points, signals, locomotive, engine, machine, or train upon a railway, tramway or street railway; the workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work."

The effect of this legislation being, therefore, to give the workman and his legal personal representatives the same right in respect of the acts of negligence mentioned in clause 5 as they would have had if the workman had not been a workman of or not in the service of the employer nor engaged in his work, it becomes necessary to consider what would have been their rights if the deceased had not occupied that relation to the appellants.

It appears to us that the position of the deceased, in view of the provisions of clause 5, and the absence of any finding that he occupied any other position, was that of a mere licensee to whom the defendants owed no duty to use care to protect him, and who had no right to complain of an injury happening to him owing to the way in which they carried on their business on their own premises: *Beven on Negligence*, 3rd ed., p. 442, note 3.

The same observations apply to the other negligence found by the jury, the statutory duty imposed upon railway companies by sec. 276 of the Railway Act (Dominion) with respect to trains or cars moving reversely having no application except where they are passing over or along a highway at rail level.

There was, however, an aspect of the case developed in the evidence, but not stated in the pleadings or dealt with by the jury, which may entitle the respondent to recover.

There was evidence that the deceased and other workmen in the employment of the appellants, in large numbers, were in the habit of crossing the railway tracks, in the way in which the deceased crossed, in going to and returning from their work, and there was some evidence that this course was taken not only with the knowledge but by the direction of the appellants.

If this were found by the jury to be the fact, we do not see why the appellants are not liable to answer for the injury done to the deceased, upon the ground that the system which they had in use at the place of the accident was a defective one within the meaning of clause 1 of sec. 3, and one which exposed their workmen to unnecessary danger.

As this aspect of the case was not dealt with by the jury, or indeed presented at the trial, the verdict and judgment cannot be allowed to stand, but it would be unfair that the action should be dismissed on that account, as that would leave the respondent without any remedy, because the time within which an action must be brought has now elapsed.

Under all the circumstances, therefore, the order to be made is that the appeal be allowed, the judgment pronounced at the trial reversed, and a new trial directed, and that the costs of the last trial and of the appeal be costs in the cause unless otherwise ordered by the Judge before whom the action shall be retried, and that the respondent should have leave to amend his statement of claim as he may be advised.

From this judgment the defendants, by special leave, appealed to the Court of Appeal. The plaintiff also entered a

cross-appeal against the judgment, submitting that the judgment was wrong in directing a new trial, and that the verdict of the jury should stand, and the judgment of the trial Judge be affirmed.

The appeal and cross-appeal were heard by Moss, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A., on the 29th January and 1st February, 1909.

I. F. Hellmuth, K.C., and *Angus MacMurchy*, K.C., for the defendants. It is not contended that the deceased was a trespasser—he was a licensee, to whom no special duty was owed by the defendants, and, as in any other case of negligence, the onus is on the plaintiff to prove his case. As regards the direction of a new trial, the Divisional Court had no power to make the order, and, even if they had the power, they should not have exercised their discretion in the way they did: *Hipgrave v. Case* (1885), 28 Ch. D. 356, *per* Selborne, L.C., at p. 361; *Durham Brothers v. Robertson*, [1898] 1 Q.B. 765, the words of Chitty, L.J., at p. 774, being specially applicable: “The trial has taken place, and it is not possible now to make any amendment by adding parties or otherwise.” We refer also to *Raleigh v. Goschen*, [1898] 1 Ch. 73, *per* Romer, J., at p. 81. [OSLER, J.A., referred to *Willetts v. Watt & Co.* (1892), 8 Times L.R. 533, [1892] 2 Q.B. 92, as being against the defendants’ view as to the power of the Court in such a case.] Even though that case should favour the view that the Court had the power, it left open the question whether the Court should exercise its power in such a way as to defeat a statute of limitation: *Hudson v. Fernyhaugh* (1889), 61 L.T. 722, in appeal (1890), 88 L.T.J. 253; *Lancaster v. Moss* (1899), 15 Times L.R. 476. In this case, at all events, a new trial should not have been ordered, as the plaintiff had had a full opportunity to present his case, and Courts should not encourage re-litigation: *Glasier v. Rolls* (1889), 42 Ch. D. 436, *per* Cotton, L.J., at p. 459, [MEREDITH, J.A., referred to *Eyre v. Highway Board of New Forest Union* (1892), 8 Times L.R. 648.] We refer also to *Hollis v. Burton*, [1892] 3 Ch. 226.

The action should have been dismissed on the ground of the absence of the notice required by the statute. There had been no waiver of this objection at the trial. Foreigners and native Canadians should be placed in the same position as regards the giving of notice. It was not necessary that it should be given by the administrator of the deceased—it may be given by the solicitor for the plaintiff, or any other person. The right of action is not at common law, but under a statute, of which, therefore, the conditions must be strictly observed. *Stone v. Hyde* (1882), 9 Q.B.D. 76, *Cox v. Hamilton Sewer Pipe Co.* (1887), 14 O.R. 300, and *Mason v. Bertram* (1889), 18 O.R. 1, are cases which shew that the notice may be given by any one. It must, however, be addressed to some one, so the mere receipt of a newspaper containing an account of the accident would not be sufficient: *O'Connor v. City of Hamilton*, 10 O.L.R. 536.

H. L. Dunn, for the plaintiff. The two main grounds urged by the appellant company are: (1) that the Divisional Court should not have allowed the plaintiff to amend his pleadings; and (2) the want of notice. As to the latter point, I rely on the statement of the case in the judgment of the Divisional Court, and I submit that the difficulty in dealing with foreigners, not speaking our language, and in ascertaining the circumstances, so as to draw the required notice, shew that there was "reasonable excuse" for the plaintiff delaying action for a few days. As to the other point—supposing the amendments permitted by the Divisional Court should be made, the plaintiff would not thereby be setting up a new case. The writ of summons in the action would cover the claim suggested by the Court below, as well as that set up in the pleadings and at the trial. The plaintiff, however, maintains, by his cross-appeal, that the jury having found negligence by the defendants in letting off steam improperly, and in there being no proper outlook on the engines, the verdict and judgment at the trial should be restored. The Divisional Court has erred in its interpretation of clause 5 of sec. 3 of the Workmen's Compensation for Injuries

Act. The following cases and authorities were referred to: *Thomas v. Quartermaine* (1887), 18 Q.B.D. 685; Beven on Negligence, 3rd ed., pp. 442 and 690; *Sullivan v. Waters* (1864), 14 Ir. C.L. 460; *Gallagher v. Humphrey* (1862), 6 L.T.N.S. 684; *Indermaur v. Dames* (1866-7), L.R. 1 C.P. 274, 2 C.P. 311; *Holmes v. North Eastern R.W. Co.* (1869), L.R. 4 Ex. 254, affirmed on appeal (1871), L.R. 6 Ex. 123; *Wright v. London and North Western R.W. Co.* (1876), 1 Q.B.D. 252; *Thatcher v. Great Western R.W. Co.* (1893), 10 Times L.R. 13, where Lopes, L.J., says: "If a person permitted another to come on his premises, and knew him to be on the premises, it was his duty to take reasonable care not to injure him." I refer also to *Spence v. Grand Trunk R.W. Co.* (1896), 27 O.R. 303; *Collier v. Michigan Central R.W. Co.* (1900), 27 A.R. 630; *Canada Southern R.W. Co. v. Jackson* (1890), 17 S.C.R. 316, especially at p. 322, per Ritchie, C.J. See also *Wallman v. Canadian Pacific R.W. Co.* (1906), 16 Man. L.R. 82, where a good many authorities are collected.

Hellmuth, in reply, argued that there was no real reason for not giving notice, as the notice required is only a notice of injury, and not of claim, and can be given by any one: Ruegg's Employers' Liability, 6th ed., p. 62. In connection with the cross-appeal, the following cases were referred to: *Bolch v. Smith* (1862), 7 H. & N. 736; *Harrison v. North Eastern R.W. Co.* (1874), 29 L.T.N.S. 844; *Castle v. Parke* (1868), 18 L.T.N.S. 367; *Jones v. Grand Trunk R.W. Co.* (1888), 16 A.R. 37; *French v. Hills Plymouth Co.* (1908), 24 Times L.R. 644; *Simkin v. London and North Western R.W. Co.* (1888), 21 Q.B.D. 453; *Hickey v. Rio Grande Western R.W. Co.* (1905), 82 Pac. Rep. 29; *Louisville and Nashville R. Co. v. Lee* (1903), 33 Southern Rep. 897.

May 5, 1909. OSLER, J.A.:—The Court below was of opinion that the plaintiff's case could not be sustained under clause 5 of sec. 3 of the Workmen's Compensation for Injuries Act, and with that I agree, but they held that the justice of the case required that he should have an opportunity of supporting it, if

he could, under clause 1 of the same section, there being evidence in that direction, though the point is not made on the pleadings, nor was the action so launched or tried. The defendants strenuously urged that the plaintiff ought not to have an opportunity of thus making a new case, especially as the time had elapsed within which a new action could be brought. The case of *Willetts v. Watt & Co.*, [1892] 2 Q.B. 92 (C.A.), is, however, an authority which well supports the judgment of the Court below in this respect. That was an action under the Employers' Liability Act, 1880, to recover damages for personal injuries, and the plaintiff in his particulars of negligence alleged that there was a defect in the condition of the way within the meaning of sec. 1, sub-sec. 1, of that Act, and on that footing the case was tried, and the plaintiff had a verdict, which was set aside and the action dismissed by a Divisional Court. On appeal the Court of Appeal agreed with the Court below that the case was not sustainable under that clause, but, being of opinion that there was evidence on which it might be sustained under sub-sec. 2 of the same section, they held that justice required them to give the plaintiff an opportunity of having the case tried upon its merits, and a new trial was accordingly granted upon terms, the particulars being amended and the plaintiff being ordered to pay the costs in the Divisional Court and the Court of Appeal, the costs of the former trial to abide the event.

Upon the merits this case is probably not so strong as the case just referred to, but we should not interfere with the discretion of the Court below on that ground. The appeal, however, must be allowed, I cannot but regret to say, upon the other objection which has been taken to the judgment, namely, that no reasonable excuse has been shewn for not having given, within proper time, the notice of the injury, as required by sec. 9 of the Act. I agree with what has been said by my brother Garrow as to this, adhering to the view I took of the law in *O'Connor v. City of Hamilton*, 10 O.L.R. 529, at p. 536, as applicable to the facts disclosed on the evidence.

GARROW, J.A.:—Appeal by the defendants against the judgment of a Divisional Court granting a new trial, on appeal by the defendants from the judgment at the trial before Clute, J., and a jury in favour of the plaintiff.

The plaintiff sued as administrator to recover damages caused by the death of his brother Michele Giovinazzo, caused it is said by the negligence of the defendants.

The deceased was a workman in the defendants' employment at their yards at Toronto Junction. A few minutes after six o'clock p.m. of the 19th September, 1907, he, with other workmen, was returning from work, and, as they had been accustomed to do, they were passing along and over the tracks in the yard, to reach the subway and exit, when the deceased was struck by an engine and killed.

The jury found, in answer to questions, that the defendants were guilty of negligence by blowing off steam or hot water at such a critical moment with such a large number of employees between the tracks; that the deceased came to his death by reason of the negligence of a person in charge of an engine of the defendants, such negligence consisting in blowing off steam or hot water, and that a proper look-out was not kept in a proper place on both engines when backing; that there was no contributory negligence; and they fixed the damages at \$600.

The Divisional Court was of the opinion that the position of the deceased, in view of clause 5 of sec. 3 of the Workmen's Compensation for Injuries Act, was, in the absence of any finding to the contrary, that of a mere licensee; that he could not claim the benefit of sec. 276 of the Railway Act (Dominion), because the engine was not passing over or along a highway at rail level; but that the deceased might have had cause to complain of a defective system, from the facts developed in the evidence, although not specifically mentioned in the pleadings; and a new trial was ordered, with leave to amend.

The Court also held that the circumstances were sufficient to excuse the giving of a written notice, as required by R.S.O. 1897, ch. 160, sec. 9, no such notice having been given in time.

The defendants appeal from this judgment in so far as it grants leave to amend and a new trial, and the plaintiff cross-appeals, and asks to have the judgment at the trial restored.

A careful perusal of the evidence has led me to the conclusion that the true position of the deceased at the time of the accident was not that of a mere licensee, as held by the Divisional Court, but of a person upon the defendants' premises by their invitation, and one to whom, therefore, the defendants owed a duty to take reasonable care that he should not be injured, within the rule laid down in such cases as *Indermaur v. Dames*, L.R. 1 C.P. 274 and 2 C.P. 311, and *York v. Canada Atlantic Steamship Co.* (1893), 22 S.C.R. 167.

It is not, however, in the result necessary to discuss at any length this point of view, because it seems to me that the plaintiff must fail upon the question of the want of notice.

The right to recover damages caused by the negligence of a fellow-servant is, of course, based entirely upon the statute; and that right is conferred upon condition (sec. 9) that notice that injury has been sustained is given within twelve weeks, and the action commenced within six months from the occurrence of the accident, or, in case of death, within twelve months from the time of death, provided that in case of death the want of such notice shall be no bar to the maintenance of the action if the Judge shall be of opinion that there was reasonable excuse for such want of notice: see also secs. 13 and 14.

The death occurred on the 19th September, 1907. The plaintiff heard of it on the 7th November, 1907, while at Kenora, in this province. He came to Toronto on the 5th December, 1907, and, not later than the 7th December, had consulted his present solicitor and instructed him to obtain a settlement of the claim, or in default to bring suit.

The time for giving the notice did not expire until the 12th December, 1907, and, however sufficient the excuse may have been for the time lost before the solicitor was instructed, after that it would be entirely another matter. The interval from the

7th to the 12th was, of course, ample in which to have given the notice, and the only excuse offered for not having done so during that interval is the solicitor's mistaken idea that he could not give the notice until he had obtained letters of administration.

The question, therefore, really resolves itself into this: is ignorance of the law a "reasonable excuse," which question must, I think, be answered in the negative if any useful effect is to be given to the provision.

In *O'Connor v. City of Hamilton*, 10 O.L.R. 529, at p. 536, Osler, J.A., says: "In the present case it is enough to say that the plaintiff was not misled by any one into not giving notice and was under no disability except that of ignorance (of the law), which can hardly be invoked as excuse for omitting to observe the requirements of the Act." The question there, it is true, arose under the Municipal Act, in which it is said the requirements as to notice are somewhat more strict than under the Workmen's Compensation for Injuries Act (see *Armstrong v. Canada Atlantic R.W. Co.*, 4 O.L.R. 560); but upon such a question as this it would be, I think, wholly illogical and unreasonable to hold that ignorance is an excuse under the one Act, and not an excuse under the other.

For these reasons, I think the appeal should be allowed, and the action dismissed; but under the circumstances the whole should be without costs.

MEREDITH, J.A.:—My opinion is that this action failed, and ought to have been dismissed, on two distinct grounds: (1) want of the notice which the Act requires; and (2) want of proof of any negligence on the part of the defendants.

According to such cases as *Trice v. Robinson* (1888), 16 O.R. 433, and *Doyle v. Diamond Flint Glass Co.* (1905), 10 O.L.R. 567, and to expressions of opinion in such cases as *Johnston v. Dominion of Canada Guarantee, etc., Co.* (1908), 17 O.L.R. 462, which this Court would doubtless feel bound to follow, the plaintiff might have given a valid notice such as the Act

requires, and indeed might have brought this action rightly, before obtaining his letters of administration. If notice were not given because the plaintiff's advisers thought that it would be ineffectual before the letters of administration were issued, that mistake was one of law, and it has, generally, I think, been held that a mistake of law does not excuse. No other excuse has been put forward. But, assuming that a mistake of law might excuse, what reasonable excuse can there be in this case? Can any one be said to have a reasonable excuse unless he has done all that he would reasonably be expected to do? In due time competent solicitors were retained by the plaintiff for the one purpose of making the claim in question; but no notice of any sort was given within the time prescribed by the Act, though the provisions of the Act in that respect were well known; nor was any such notice given when the letters of administration were obtained, nor until many weeks afterwards. The Act requires a reasonable excuse; the Courts ought not to pervert that into any sort of a pretext. Any person, knowing, as the plaintiff did, the requirement of the Act, and desiring to do that which was reasonable, and anything like fair to the defendants, would have given such a notice as the Act requires within the prescribed time, so that the defendants might have the benefit of such a notice, and also so as to strengthen proof that they were not prejudiced by the want of notice from a hand legally qualified to give it; and he would have followed that up by a notice, such as the Act requires, immediately after becoming, as he believed, for the first time legally qualified to give it. Giving notice long afterwards shews that the plaintiff, or those to whom he had from the first entrusted his case, knew that something ought to be done, but at that very late day it could not be of any avail; it cannot afford even a plausible pretext for thitherto failing to give any sort of notice such as the plaintiff knew the legislature intended that the defendants should have. My views upon this subject are fully set out in the case of *O'Connor v. City of Hamilton* (1904), 8 O.L.R. 391, 398, and so need not now be repeated.

Upon the other question—whether there was proof of any negligence on the part of the defendants—it was contended that the driver of the engine was negligent in opening the cylinder cocks of his engine when he might have known that workmen might be passing. But no damage arose from that necessary act, and no one was injured by the discharged steam or water, if it was so discharged. Admittedly it was a proper, indeed an imperatively necessary, thing to do at times; and that it was not done at the proper time and in a proper place, so far as the requirements of the engine were concerned, was not attempted to be proved; and there was no evidence of any other place where it might with greater safety be done. There was no difficulty in stepping out of the way of the discharged steam or water; the difficulty and the disaster arose altogether from the fact that there was another engine moving, upon another track, at the same time; so that when the man stepped out of the way of the discharge from the one, he ran into the way of the other engine and was run over and killed, although the other two men with him experienced no difficulty. If there were any negligence on the part of those in charge of the first mentioned engine, it was in not observing the whole complication of events, foreseeing what might possibly happen, and averting it; not seeing both the man and the proximity of the other engine, and not anticipating that some one might, unobservant of the other engine, be put in some danger by it; but there was no finding of negligence in that respect, and I cannot think that, upon the whole evidence, there rightly could be.

The accident seems to have been one of those which are more or less inseparable from an occupation necessarily dangerous; or in pursuing a course, or way, from which it is impossible to remove every element of danger.

The granting of a new trial to enable the plaintiff to set up an entirely new case was, I think, contrary to proper practice, and unfair to the defendants, who had wholly succeeded in the action, as carefully and deliberately presented by the plaintiff,

and who were held entitled to have it dismissed: see *Eyre v. Highway Board of New Forest Union*, 8 Times L.R. 648.

If the plaintiff have any other cause of action he is at liberty to prosecute it in the usual way. No injustice is done in pursuing the regular course; injustice may be done, and, indeed, must be done, when the successful party is deprived of his rights upon the issues which have been tried, in order that a new case entirely may be made against him; whilst if accorded those rights—a dismissal of the action as brought with costs—there can be no substantial object in retaining that action instead of bringing a new one; and grave injustice may be done, as, for instance, in depriving the opposite party of the benefit of a statute of limitations. If it were clear that the plaintiff had a good cause of action, upon which he must succeed when duly presented, and which through some mistake, as to which he was blameless or excusable, was not sooner presented, the case would be different. But this case is entirely different from that; the suggested new cause of action is at best a forlorn hope, not supported by the evidence, nor suggested by any one until the case reached the Divisional Court; indeed, the evidence, as far as it goes, is altogether opposed to it; there is nothing whatever to indicate that the workmen had not a safe and proper way to and from their work without passing along the tracks; they seem to have adopted that course of their own motion as a short cut, knowing of all the dangers to be encountered in going that way, including that which caused the man's death.

I would allow the appeal and dismiss the action.

Moss, C.J.O., and MACLAREN, J.A., concurred.

NEGLIGENCE—WORKMEN'S COMPENSATION ACT.

ONTARIO.]

[COURT OF APPEAL.

O'BRIEN V. MICHIGAN CENTRAL R.W. Co.

(19 O.L.R. 345.)

Master and Servant—Injury to Servant—Negligence—Railway—Fall of Lump of Coal from Locomotive Tender—Workmen's Compensation for Injuries Act, sec. 3, sub-sec. 5—Res Ipsa Loquitur—Release—Evidence—Invalidity.

The plaintiff was in the employment of the defendants, and, while at work upon a railway track, was struck by a lump of coal which fell from the tender of a passing locomotive, and injured. It appeared from the evidence, in an action for damages for the injury sustained, that the coal was unnecessarily piled in the tender above the sides in such quantity and manner that the rapid motion of the train shook down the lump, which, falling upon the corner, flew off with dangerous force and struck the plaintiff:—

Held, that the unexplained fall of the coal, in the circumstances stated, was in itself evidence from which an inference might well be drawn that those in charge or control of the locomotive (Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, sec. 3, sub-sec. 5) were negligent in their mode of using it by piling or permitting coal to be piled upon the tender so high and without protection that chunks of it could be hurled by the necessary motion of the train with such force as to break a man's leg 15 or 20 feet away; and a verdict for the plaintiff for \$1,500 under the Workmen's Compensation for Injuries Act, was upheld.

Doctrine of *res ipsa loquitur* explained and applied.

The defendants set up as a bar to the action a release signed by the plaintiff, after action, in consideration of \$300 paid to him by the defendants. The plaintiff was without independent advice, and stated that he believed from what was said that what he was releasing, and all he intended to release, was a claim to wages during his compulsory idleness, all parties, including the doctor, being under the impression that at the end of the period for which he was being paid he would be well and back at work:—*Held*, that, as the plaintiff's statement was believed by the trial Judge, a finding against the validity of the release should not be disturbed.

Judgment of CLUTE, J., affirmed.

AN appeal by the defendants from the judgment of CLUTE, J., who tried the action without a jury, in favour of the plaintiff for the recovery of \$1,200 and costs.

The plaintiff was in the employment of the defendants as a section-man, and, while he was at work upon the railway track, he was struck by a lump of coal which fell from the tender of a passing locomotive, and injured.

The plaintiff claimed \$5,000 damages on the basis of the defendants' common law liability, and, alternatively, \$2,000 damages on the basis of the defendants' liability under the Workmen's Compensation for Injuries Act.

The defendants pleaded "not guilty by statute;" that notice of injury was not served upon them within the time limited by the Workmen's Compensation for Injuries Act; and a release of the cause of action in consideration of the payment to the plaintiff of \$300, etc.

CLUTE, J., found that the notice of injury was given too late, but that there was reasonable excuse for not giving it in time, and that the defendants had not been prejudiced; that a release was executed by the plaintiff, but should not be allowed to stand; and that the evidence was sufficient to support the plaintiff's claim under the Workmen's Compensation for Injuries Act, in respect of which he assessed the damages at \$1,500, and directed that the \$300 paid to the plaintiff should be deducted therefrom.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A., on the 30th April, 1909.

I. F. Hellmuth, K.C., for the defendants. The finding of the trial Judge as to the release is against the evidence, and should be reversed. The finding of negligence should also be reversed; there is no evidence to shew the cause of the fall of the lump of coal from the tender, and it is not, under the authorities a case of *res ipsa loquitur*. See Beven on Negligence, 3rd ed., p. 129 *et seq.*; *Gulf Colorado and Sante Fe R. Co. v. Wood* (1901), 63 S.W.R. 164.

J. M. Godfrey and *W. A. Henderson*, for the plaintiff, *contra*, referred upon the question of the release to *Begg v. Toronto R.W. Co.* (1905), 6 O.W.R. 239; *Lyall v. Edwards* (1861), 6 H. & N 337; *Doyle v. Diamond Flint Glass Co.* (1904), 8 O.L.R. 499; *Smith v. McIntosh* (1906), 13 O.L.R. 118; *Allcard v. Skinner* (1887), 36 Ch. D. 145; *Johnson v. Grand Trunk R.W. Co.* (1894), 25 O.R. 64; and upon the question of negligence and the doctrine

of *res ipsa loquitur* to *McCord v. Cammell*, [1896] A.C. 57; *Kearney v. London Brighton and South Coast R.W. Co.* (1871), L.R. 6 Q.B. 759; *Byrne v. Boadle* (1863), 2 H. & C. 722; *Crawford v. Upper* (1889), 16 A.R. 440; *Dublin Wicklow and Wexford R.W. Co. v. Slattery* (1878), 3 App. Cas. 1155; Beven on Negligence, 3rd ed., pp. 111, 119; *Union Pacific R. Co. v. Erickson* (1894), 29 L.R.A. 137.

Hellmuth, in reply, cited *Asbestos and Asbestic Co. v. Durand* (1900), 30 S.C.R. 285.

September 20, 1909. The judgment of the Court was delivered by GARROW, J.A.:—The action was brought to recover damages for an injury caused to the plaintiff under somewhat unusual circumstances. He was in the defendants' employment as a section-man, and, while he was working upon the railway track, a train from the east came along, and a piece of coal fell from the tender and struck him on the ankle, which was thereby fractured.

On seeing the train coming the plaintiff moved back "15 or 25 feet" from the track, and what followed is thus described by him in his evidence:—

"Q. What next happened? A. A chunk of coal came off the tender and struck me on the ankle.

"His Lordship: Q. Do you mean fell off by the motion of the train? A. By the motion of the train.

"Q. Was there a curve there? A. No, a straight track.

"Mr. Henderson (the plaintiff's counsel): Q. What condition was the coal in the tender? A. Piled up, it was piled up like this you see, and rolled off, it rolled down and struck the corner of the tender.

"Q. Can you give us any idea how high the coal was piled up? A. Not exactly.

"His Lordship: Q. It rolled off and struck the corner of the tender, and what then? A. Flew towards me.

"Mr. Henderson: Q. What did you do? A. Fell over on the ground to escape it.

"Q. Have you seen other tenders loaded with coal? A. Yes, I have, sitting in the hotel window.

"Q. What can you say with regard to the height of the coal on this tender as compared with others? A. I could not exactly say, it would be about the same, but then they were piled up just the same.

"His Lordship: Q. Is it usual for the coal to be piled up in that way? A. I see a good many of the engines piled up that way.

"Q. You never saw any that fell off? A. I don't want to see any more.

"Mr. Henderson: Q. Did you ever see any other? A. No, only just starting away they drop off some small chunks.

"Q. At what rate was the train going? A. I could not say exactly. It was going at a high rate of speed.

"Q. And was the tender shaking? A. Well, I did not notice that; sometimes she is shaking when she gets on a level track; when I saw the coal she must have been rocking like that to start the coal down. As soon as I seen it I started to protect myself.

"Q. When the coal struck the corner of the tender what happened after that? A. Why it came at an angle like, and went off in a corner.

"Q. What happened to you? A. I got struck by it, somewhere below the ankle and got a broken ankle."

The defendants pleaded: (1) "not guilty by statute;" (2) that notice of injury had not been given within the time limited by the Workmen's Compensation for Injuries Act; and (3) a release after action.

Clute, J., held that, although the notice of injury was too late, there was reasonable excuse for not giving it in time, and that the defendants had not been prejudiced, as was indeed admitted; that the release had been obtained under circumstances which, having regard to the physical and mental condition of the plaintiff, rendered it inequitable that it should be allowed to stand; that the evidence was sufficient to support the plaintiff's claim under the Workmen's Compensation for Injuries Act; and

he awarded \$1,500 as damages, upon which the \$300 paid when the release was obtained was to be credited.

The defendants apparently acquiesce in the judgment upon the question of notice of action, since no argument was addressed to this Court upon that subject, nor is it mentioned in the reasons of appeal. But the findings of the learned Judge upon the other questions are both strenuously objected to.

Dealing first with the question of the release; it is of course obvious that in determining this issue (which was tried separately) much would depend upon the mental and physical characteristics of the plaintiff as displayed in the witness-box. It may not be in the usual sense a question of credibility, that is, the bald question whether the plaintiff or the very respectable witnesses called by the defence should be believed, but rather whether the plaintiff himself, who had not been protected by independent advice, could be believed in stating that, no matter what was explained, he believed from what was said that what he was releasing, and all he intended to release, was a claim to wages during his compulsory idleness, all parties, headed by the doctor, apparently being under the impression that at the end of the period for which he was being paid he would be well and back at work. The plaintiff was evidently believed by the learned Judge, and, that being so, I think his conclusion upon this branch should, under all the circumstances, not be disturbed.

Upon the merits or main branch as it may be called, I also, after some hesitation, agree with Clute, J.

The evidence of negligence is, it is true, meagre, unusually so, but it sufficiently appears, I think, that the coal was unnecessarily piled in the tender above the sides in such quantity and manner that the rapid motion of the train could and did shake "down" the "chunk," which, falling upon the corner, flew off with dangerous force and struck the plaintiff.

Mr. Hellmuth, of counsel for the defendants, contended that the maxim *res ipsa loquitur* has no application in cases of negligence between servant and master, and relied upon

the remarks to be found in Beven on Negligence, 3rd ed., at pp. 129, 130. But what is there said, taking it altogether, only amounts to this, that liability does not arise from mere proof of the accident, a statement which might, I think, safely be made concerning other actions than the two which the learned author mentions, namely, actions for injuries upon highways, and actions by a servant against a master.

As I understand it, the application of the maxim, which after all is a mere phrase and not a rule of law, never dispenses with any necessary proof, but is only intended as a guide to the point in the evidence at which the burden of proof is shifted. Negligence consists of two elements, namely, the duty to take care and its breach, the burden of proving both of which originally rests upon the plaintiff.

The maxim has nothing to do with the former; and in the case of the latter only determines that when the plaintiff has given evidence of the duty and also of a certain condition of things causing or conducing to the injury complained of, he has proved enough to call for explanation by the defendant; in other words, the burden of proof is shifted. So understanding the matter, I see no reason why the maxim is not as applicable in such cases as this as it is in any other case of negligence. The limited class of things appearing in proof to which the maxim will be applied may be perhaps best illustrated by a citation or two. In *Smith v. Baker*, [1891] A.C. 325, at p. 335, Lord Halsbury, L.C., says: "I think the unexplained and unaccounted for fact, that the stone was being lifted over a workman, and that it fell and did him damage, would be evidence for a jury to consider of negligence in the person responsible for the operation." And in *Scott v. London Dock Co.* (1865), 3 H. & C. 596, in the Exchequer Chamber, at p. 601, Erle, C.J., delivering the considered judgment of the Court, said: "There must be reasonable evidence of negligence. But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable

evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

So in this case, the unexplained fall of the coal, under the circumstances stated, is in itself, in my opinion, evidence from which an inference might well be drawn that those in charge or control of the locomotive (see sub-sec. 5 of sec. 3 of the Workmen's Compensation for Injuries Act*) were negligent in their mode of using it by piling or permitting the coal to be piled upon the tender so high and so unprotected that chunks of it could be hurled by the necessary motion of the train with such force as to break a man's leg 15 or 20 feet away.

The plaintiff's evidence may be meagre, but it was uncontradicted. Indeed, he appears to have not been cross-examined as to any of the statements which I have quoted and upon which the judgment rests. Nor was any evidence whatever given by the defendants in explanation or excuse—circumstances which, while they would not of course excuse a lacking vital element, yet cannot but in some degree enhance the testimonial value of the evidence actually given by the plaintiff. So that, upon the whole, I am of the opinion that there was not only some evidence of negligence, but quite enough to justify the inference drawn by Clute, J.

See the very similar cases of *Gulf Colorado and Santa Fe R. Co. v. Wood*, 63 S.W.R. 164, and *Union Pacific R. Co. v. Erickson*, 29 L.R.A. 137.

The appeal should be dismissed and with costs.

*R.S.O. 1897, ch. 160, sec. 3: "Where personal injury is caused to a workman—

"5. By reason of the negligence of any person in the service of the employer who has the charge or control of any points, signals, locomotive, engine, machine, or train upon a railway . . . the workman . . . shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work."

INFANT—NEGLIGENCE—BENEFIT.

ONTARIO.]

[COURT OF APPEAL.

McKEOWN v. TORONTO R.W. Co.

(19 O.L.R. 361.

Fatal Accidents Act—Death of Young Child Caused by Negligence—Pecuniary Loss of Parent—Reasonable Expectation of Benefit—Damages—Jury—Evidence—Judge's Charge.

A verdict of a jury for \$300 damages for the death of the plaintiff's child, aged four years, in an action under the Fatal Accidents Act, was upheld by a Divisional Court and by the Court of Appeal (Moss, C.J.O., and MACLAREN, J.A., dissenting), where it appeared that the child was healthy, intelligent, and with as good a prospect of prolonged life as any infant of that age could be said to have. The question is for the jury, upon the evidence; pecuniary benefit or advantage need not have been actually derived by the parent previous to the death; the probability of the continuance of life and the reasonable expectation that in that event pecuniary benefit or advantage would have been derived are proper subjects for consideration.

Pym v. Great Northern R.W. Co. (1862), 2 B. & S. 759, and *Blackley v. Toronto R.W. Co.* (1897), 27 A.R. 44n., applied and followed.

The trial Judge's direction to the jury upon the questions of damages and the findings of the jury upon the question of negligence were also considered and upheld by the Divisional Court.

ACTION by Thomas J. McKeown, under R.S.O. 1897, ch. 166, an Act respecting Compensation to the Families of Persons Killed by Accident and in Duels, to recover compensation for the injuries sustained by the plaintiff, in consequence of the wrongful acts of the defendants in negligently, carelessly, and unlawfully causing the death of Thomas Norman McKeown, the plaintiff's son.

The action was tried before FALCONBRIDGE, C.J.K.B., and a jury, at Toronto, on the 12th and 13th October, 1908. The jury answered questions in favour of the plaintiff, and assessed the compensation at \$300, for which amount the trial Judge on the 16th October, 1908, ordered judgment to be entered for the plaintiff with costs.

The defendants appealed to a Divisional Court, and their appeal was heard by MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ., on the 26th November, 1908.

D. L. McCarthy, K.C., for the defendants.

John MacGregor, for the plaintiff.

December 18, 1908. MEREDITH, C.J.:—This is an appeal by the defendant company from the judgment in favour of the respondent which the Chief Justice of the King's Bench on the 16th October, 1908, directed to be entered after the trial before him with a jury at the autumn sittings at Toronto on the 12th and 13th days of that month; and in the alternative the appellants ask for a new trial on the ground of misdirection and on other grounds.

The action is brought by the father of a child a little over four years old, who was killed by being struck by a car of the defendants, owing, as the plaintiff alleges, to the defendants' negligence, to recover damages for the death of the child.

Various acts of negligence were relied on at the trial by the plaintiff's counsel, and the jury were directed to answer questions submitted to them, the questions and their answers being as follows:—

1. Were the injuries which resulted in the death of Thomas Norman McKeown caused by any negligence of the railway company or its servants? A. Yes.

2. If so, wherein did such negligence consist? A. In the motorman not acting promptly.

3. Or were such injuries caused by the negligence of the plaintiff? A. No.

4. Or by the negligence of the said Thomas Norman McKeown? A. Yes.

5. Could the said Thomas Norman McKeown, by the exercise of reasonable care, have avoided the accident? A. Children of that age are not responsible.

6. If you answer "yes" to the last question, nevertheless could the defendant company, by the exercise of reasonable care, have avoided the accident? A. Yes.

7. At what sum do you assess the compensation to be awarded to the plaintiff? A. \$300.

Upon these answers the learned Chief Justice directed that judgment should be entered for the plaintiff for the sum at which his damages were assessed.

In support of the alternative case made by the motion to this Court, it was argued for the defendants that the learned Chief Justice in his charge to the jury improperly referred to the fact that in a recent case "where an action was brought for the death of a child eight years old, he had allowed \$400 damages, and that his decision had been upheld by the Court in appeal," and that he also "improperly suggested to the jury that the defendants might be satisfied to submit to a small verdict," and that this was misdirection entitling the defendants to a new trial.

That, as the fact is, no objection was made to the charge on the first of these grounds, would be sufficient for the disposition adversely to the defendants of that ground; but I desire to say that, even had the objection been taken at the trial, I should have reached the same conclusion.

The charge must, of course, be read in connection with and in the light of what had previously taken place at the trial. The defendants' counsel at the close of the plaintiff's case had moved for the dismissal of the action, on the ground, among others, that it had not been shewn that the plaintiff had sustained any pecuniary damage by the death of his child, and in supporting his motion had referred to the case of *Ricketts v. Village of Markdale* (1899-1900), 31 O.R. 180, 610, the case to which the learned Chief Justice had made reference in his charge, and mentioned the facts and circumstances of that case, though he did not, as far as appears from the shorthand notes, mention the amount which the plaintiff had recovered; that was stated by the learned Chief Justice in his charge to the jury; but, in my opinion, so far from the defendants having been prejudiced by what was said, the observations of the Chief Justice were directed to pointing out the difference between the case with which they had to deal and the *Ricketts* case, and emphasising the fact that in the latter case the child, "though he was so young" (seven years old), "was a real

benefit and pecuniary advantage to his parents;" and further on he told the jury that the sum he had awarded in the *Ricketts* case was severely criticised by one of the Judges in the Court, who said that he would not have awarded so large a sum.

In my opinion, the defendants have also failed to establish the other ground of misdirection relied on.

The following are the only parts of the charge which deal with the matter which forms the subject of this ground of objection.

On p. 137 the learned Judge is reported to have said: "I shew you how closely the line is drawn by the law in order to indicate to you that there is not any object in your endeavouring to benefit this plaintiff by returning any extravagant verdict. If you think that the plaintiff is entitled to succeed, you will best serve his interests by awarding such a reasonable and moderate sum as may have a chance of being upheld in the Court above, because I assure you that any extravagant verdict could not possibly stand." And on pp. 147-8, he is reported to have said: "However, it may be that there has been enough of such services shewn to justify you in rendering a verdict for something, but I warn you again not to think that you are helping the case of the plaintiff by awarding any unreasonable or excessive sum. It might well be that the company, having regard to the dreadful injury inflicted upon these parents, whether they are in fault or not, or assuming that they are not in fault, might assent to a reasonable or small verdict and let it go; but they would certainly invoke the aid of the Court if anything like a substantial verdict were endeavoured to be enforced against them. However, I do not know that you have any right to consider that. With reference to that last observation of mine, I think it is fairer for you to deal with it without reference to anything that the company might or might not do."

Fairly read and as the jury must have understood them, these observations were intended to warn the jury against being led by their sympathies to award large damages, and, so far from being calculated to prejudice the defendants, were, I think, distinctly

favourable to them. Even if it were otherwise, the objectionable part of the observations was removed by the concluding words which I have quoted.

The reversal of the judgment is sought on the ground that there was not evidence for the jury either of negligence of the appellants resulting in the death of the child, or of such damage as alone can be recovered in an action such as this.

Two persons only gave testimony as to the circumstances under which the collision between the child and the car took place, Mrs. McDonagh, a witness called by the plaintiff, and Joseph Dalton, a witness called by the defendants, who was the motorman of the car.

According to the testimony of the latter, he was proceeding down Bathurst street at the rate of six or seven miles an hour, with the power off and his car "rolling down," when he saw two children, one of whom, as it turned out, was the deceased child, on the pavement and between the curb and the railway tracks and "fifteen feet, perhaps more," south of the car, running towards the track in a south-easterly direction; he then rang his gong and put on the air brake quickly, which caught, and reversed, but was unable to stop his car in time to avoid striking the children. On cross-examination, he testified that when he first saw the children the car was about fifteen feet from them, and that the children had almost crossed the whole track before they were struck. He also testified that the car went only about half its length from the place where it was when he applied the air brake, before being brought to a stop. Upon cross-examination his statement was that the car went half its length after the children were struck, and at another time that he went "half a car length, between that and a car length," after putting on "the air," and in answer to the last question put to him on cross-examination he said that there was nothing at all to "prevent" his "view of the children" from further back, and again in re-examination he testified that there was nothing to obstruct his view of the children as he came down the street.

Mrs. McDonagh's testimony was that as the car which struck the children was coming down Bathurst street the two children spoken of by the motorman and her "little boy" were standing on the west side of that street; that the latter, seeing the car, said to the girl, "Irene, don't go, there is a car coming," but that the two children started to cross the road, and that when they did so the car was about sixty feet away from them, and that the "front side of the fender near the end" struck the deceased. On cross-examination this witness admitted that at the coroner's inquest she had testified that the car was ten or fifteen feet away from where the deceased was struck when she first saw it, but explained that the reason for her differing statement at the trial was that since the inquest the distance had been measured and had been ascertained to be sixty feet.

Looking now at the answer of the jury to the second question—that the negligence found by the answer to the first question consisted "in the motorman not acting promptly"—the question is whether there was evidence to go to the jury of that negligence.

The argument of Mr. McCarthy was that the answer to the second question must be taken to mean that the only negligence with which the motorman was chargeable was not acting promptly in stopping his car after he saw the children crossing at the distance of fifteen feet away, and that there was no evidence whatever to support such a finding.

So narrow a construction ought not, in my opinion, to be given to the answer. It may well mean, I think, that the jury believed the testimony of Mrs. McDonagh, that the children started to cross the street when the car was sixty feet away from them, and not fifteen feet, as the motorman testified, and that, seeing them at that distance, he ought to have anticipated danger to them if the car was not promptly stopped, and that he did not promptly apply the means at his disposal to stop the car, which, on his own statement, he began to use when the car was but fifteen feet away from the children, and which brought the car to a stop after it had proceeded half its length; and, if that be the mean-

ing of the answer, it is impossible to say that there was no evidence to support the finding, for there was abundant evidence in addition to Dalton's own statement that the car might have been brought to a stop in much less than sixty feet.

The weight to be attached to the testimony of the witnesses was of course for the jury, and it was competent to them, as they appear to have done, to prefer her evidence on the crucial point of the case to that of Dalton.

I am also unable to agree with Mr. McCarthy's argument on the question as to the damages. It did not differ substantially from that presented to the Court of Appeals of the State of New York in *Houghkirk v. Delaware and Hudson Canal Co.* (1883), 92 N.Y. 219; and dealing with it, after referring to cases of actual, definite loss, capable of proof, and of measurement with approximate accuracy, the Court went on to say: "But the value of a human life is a different matter. The damages to the next of kin in that respect are necessarily indefinite, prospective, and contingent. They cannot be proved with even an approach to accuracy, and yet they are to be estimated and awarded, for the statute has so commanded. But even in such case there is and there must be some basis in the proof for the estimate, and that was given here and always has been given. Human lives are not all of the same value to the survivors. The age and sex, the general health and intelligence of the person killed, the situation and condition of the survivors and their relation to the deceased; these elements furnish some basis for judgment. That it is slender and inadequate is true . . . ; but it is all that is possible, and while that should be given, . . . more cannot be required:" p. 225.

With this statement of the law I entirely agree, and would be prepared to apply it to this case, unless the law has been differently laid down by decisions binding upon us.

So far, however, from that being the case, the law as laid down in this province is in substantial agreement with the statement of it in the passage I have quoted from the New York deci-

sion, and it is settled that it is not necessary to shew by evidence that any pecuniary benefit had been actually received from the deceased: *Ricketts v. Village of Markdale*, 31 O.R. 180, 610; *Lett v. St. Lawrence and Ottawa R.W. Co.* (1884), 11 A.R. 1, affirmed 11 S.C.R. 422.

Two Irish cases, *Holleran v. Bagnell* (1880), 6 L.R. Ir. 333, and *Hull v. Great Northern R.W. Co. of Ireland* (1890), 26 L.R. Ir. 289, in which a different view was taken, were cited by Mr. McCarthy; but it is enough to say, as to these cases, that the decisions of our own Courts must be followed in preference to them, even if I were of opinion—which I am not—that the Irish cases were rightly decided.

I refer also to the following observations of Patterson, J.A., made in the *Lett* case as to the Irish decisions: “The doctrine thus adopted by the Irish Courts may, I think, be fairly stated as being that no injury within the contemplation of Lord Campbell’s Act can result from the death of one from whom no benefit has been received during his life. This is so far opposed to the tenor of all the English cases, and to the express decision in some of them, that it is obviously useless to look to the judgments of the Irish Courts for assistance, while we take those of the English Courts as our guide:” 11 A.R. at p. 29.

In *Blackley v. Toronto R.W. Co.* (1897), reported in a note to *Rombough v. Balch* (1900), 27 A.R. 32, 44, Osler, J.A., said: “The only working rule, therefore, having regard to the other propositions established in respect of the action, is that laid down in *Pym v. Great Northern R.W. Co.* (1862), 2 B. & S. 759, viz., that it is for the tribunal to say, ‘under all the circumstances, taking into account all the uncertainties and contingencies of the particular case, whether there was such a reasonable and well founded expectation of pecuniary benefit as can be estimated in money, and so become the subject of damages.’ It has not been decided by any case by which we are bound that there must be evidence of pecuniary advantage derived from the deceased, previous to or at the time of his death. On the contrary, in *Franklin*

v. *South Eastern R.W. Co.* (1858), 3 H. & N. 211, it is said by the Court: 'We do not say that it was necessary that actual benefit should have been derived, a reasonable expectation is enough, and such reasonable expectation may well exist, though from the father not being in need, the son had never done anything for him.' " p. 45.

The present Chief Justice of Ontario, in the *Rombough* case, referred to this statement as a summary of the law, after a review of the authorities, and the law thus expounded was applied by the Court of Appeal in that case, and the decision of the Court of Appeal was affirmed by the Supreme Court on the 12th June, 1900: *Balch and Peppard v. Rombough*, *Coutlee's Digest* (1875-1903), p. 432.

Though no reported case had been cited, nor have I found any, in which an award of damages has been made in the case of a child so young as the deceased child in this case, it is impossible to say that, as a matter of law, his being of such tender years precluded the plaintiff from obtaining the benefit of the Act, the provisions of which he is invoking by his action. All that can be said is that the younger the child is the more difficult it is to determine whether there is such a reasonable and well founded expectation of pecuniary benefit as can be estimated in money, and to estimate the damages which should be awarded; and there remains, as an insuperable difficulty in the way of the defendants' success, the fact that it was for the jury to determine both of these matters, there being, as I have already said, evidence proper to be submitted to them.

The result is that, in my opinion, the appeal fails and should be dismissed with costs.

MACMAHON, J.:—I give a grumbling assent.

TEETZEL, J.:—I agree.

The defendants on the 22nd December, 1908, moved before a Judge of the Court of Appeal for leave to appeal to that Court

from the order of the Divisional Court; and on the 29th December, 1908, upon the defendants undertaking to pay the costs of the plaintiff as between solicitor and client in any event of the appeal, and waiving any right to the costs of the action and of the appeal to the Divisional Court, in case it should be held that the plaintiff was entitled to any damages, it was ordered that the defendants be allowed to appeal to the Court of Appeal, the appeal to be limited to the question of the right of the plaintiff to damages for the death of his son.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, and MACLAREN, J.J.A., and MAGEE, J., on the 4th February, 1909.

Wallace Nesbitt, K.C., for the defendants. The sole point is whether the case of this child comes within Lord Campbell's Act. The principles are laid down in Ruegg's *Employers' Liability*, 7th ed., p. 151 *et seq.*, citing *Duckworth v. Johnson* (1859), 4 H. & N. 653, and the Irish cases, including *Bourke v. Cork and Macroom R.W. Co.* (1879), 4 L.R. Ir. 682. The view there given is opposed to the American authorities, with their appeal to sympathy and sentiment. There must be a reasonable expectation of benefit founded upon something in the past. In all the cases up to date in our own Courts there has been some evidence of benefit received. See *Mason v. Bertram* (1889), 18 O.R. 1, and cases there cited: *Blackley v. Toronto R.W. Co.*, 27 A.R. 44n. This is in accord with *Hull v. Great Northern R.W. Co. of Ireland*, 26 L.R. Ir. 289. In the present case it is a mere matter of surmise whether there would have been benefit. There must be something more than the bare possibility of benefit—something like what we have in *Ricketts v. Village of Markdale*, 31 O.R. 180, 610. All we are told in this case is that the plaintiff is a book-keeper, and that the child ran messages. In the *Duckworth* case the boy was fourteen, and earned 4 shillings a week. See also *Franklin v. South Eastern R.W. Co.*, 3 H. & N. 211; *Davidson v. Stuart* (1903), 34 S.C.R. 215, 222.

M. Lockhart Gordon, on the same side, referred to *Thompson v. Trenton Electric and Water Power Co.* (1908), 11 O.W.R.

1009; *Metropolitan R.W. Co. v. Jackson* (1877), 3 App. Cas. 193, 197; *Central Vermont R.W. Co. v. Franchère* (1904), 35 S.C.R. 68; *Hetherington v. North Eastern R.W. Co.* (1882), 9 Q.B.D. 160.

John MacGregor, for the plaintiff. The questions are, whether the father can, in the circumstances, maintain the action, and whether the case was properly submitted to the jury. If the boy had lived after his injury, he could have himself maintained an action for the injury. The *Ricketts* case is the logical result of the *Lett* case. In the *Ricketts* case the boy was seven years old, and earned nothing—all that was shewn was a desire to assist the father. By the Fatal Accidents Act, R.S.O. 1897, ch. 166, sec. 2, a right of action is given where the death of a person has been caused by such wrongful act, etc., as would (if death had not ensued) have entitled the person injured to maintain an action; and by sec. 3 the Judge or jury may give such damages as he or they think proportioned to the injury resulting from such death to the persons for whose benefit the action has been brought. Section 1902 of the New York Code is similar, and the New York cases are applicable. I refer especially to *Medinger v. Brooklyn Heights R.R. Co.* (1896), 6 App. Div. 42; and to the American cases referred to in *Renwick v. Galt, etc., Street R.W. Co.* (1905-6), 11 O.L.R. 158, 12 O.L.R. 35. The questions are for the jury. The damages here are very reasonable. [Discussion of cases cited in the Divisional Court and by counsel for the defendants.]

Nesbitt, in reply. In all the cases reported since 1846 throughout the Empire, there is no case like this. The *Ricketts* case went farther than any previous one, but there the boy really assisted the father by working in the garden and peddling vegetables. In this case the father may have intended to educate the child for a profession, and so as a matter of pecuniary benefit is a gainer. If damages can be given in this case, why not in the case of an unborn child?

September 20, 1909. OSLER, J.A. :—It is the extreme youth of the child for whose death this action is brought which alone causes hesitation in maintaining the plaintiff's right to recover. The damages recoverable under the Act cannot be founded on sentimental considerations, but are to be given in respect of some pecuniary loss only, and that not merely nominal, caused by the death. Here the child was an infant of four years of age, healthy, intelligent, and with as good a prospect of prolonged life as any infant of that age can be said to have. Was its death a damage to the parent within the meaning of the Act? Having regard to the position in life of the latter, I cannot hold that in point of law it was not, or that in the case of a child of that description damages to be estimated by such considerations as the decided cases warrant may not be sustained. The question is for the jury, upon the evidence. It is settled that pecuniary benefit or advantage need not have been actually derived by the beneficiary previous to the death, and therefore the then present inability of the deceased to confer such benefit or advantage is not conclusive against the right to recover. The probability of the continuance of life and the reasonable expectation that in that event pecuniary benefit or advantage would have been derived are proper subjects for consideration. *Pym v. Great Northern R.W. Co.*, 2 B. & S. 759, lays down what I have always considered to be the working rule, viz., that it is for the tribunal to say, "under all the circumstances, taking into account all the uncertainties and contingencies of the particular case, whether there was such a reasonable and well-founded expectation of pecuniary benefit as can be estimated in money, so as to become the subject of damages." The age of a child, the probability of its continued life to a period when it will become useful to a parent in the way of performing services which a child of parents in the station of life of the plaintiff usually performs, or of earning money of which such a parent would in the natural course of things have the benefit, are circumstances which a jury may properly take into consideration. These are matters of pecuniary value, and "all such circumstances as might in any particular

case terminate or abbreviate their enjoyment or diminish their value must be taken into consideration by the jury." Damages in such a case must necessarily be small, and I do not say that in the case of a younger child or of one that is feeble or unhealthy, the probability of their existence may not be diminished to a vanishing point. I do not think that is shewn to be the case in the present instance. The controlling hand of the Court is the safeguard of the defendant against the disposition of the jury to award such extravagant damages as have been given in many of the American cases cited.

I am on the whole of opinion that on the evidence a recovery is warranted by the rule or principle established in the *Pym* case and in such cases as *Franklin v. South Eastern R.W. Co.*, 3 H. & N. 211; *Dalton v. South Eastern R.W. Co.* (1858), 4 C.B.N.S. 296; *Duckworth v. Johnson*, 4 H. & N. 653; *Wolfe v. Great Northern R.W. Co.* (1890), 26 L.R. Ir. 548; *Blackley v. Toronto R.W. Co.*, 27 A.R. 44n.; and others. The cases of *Renwick v. Galt, etc.*, *Street R.W. Co.*, 12 O.L.R. 35, 37 (C.A.), *Clark v. London General Omnibus Co.*, [1906] 2 K.B. 648 (C.A.), and *Jackson v. Watson*, [1909] 2 K.B. 193 (C.A.), may also be referred to.

The damages, though they err on the side of liberality, as they usually and perhaps inevitably do in these cases, not being capable of being estimated with exactitude, are not so large as to invite interference, and I would therefore affirm the judgment and dismiss the appeal.

GARROW, J.A.:—No case of authority in this Province was cited, nor have I been able to find one, in which a recovery was had in the case of the death of a child so young (four years) as that of the plaintiff. The nearest is *Ricketts v. Village of Markdale*, 31 O.R. 610, in which the age was eight.

It was long ago determined that it is not necessary in order to maintain such an action that actual pecuniary advantage must have been derived previous to the time of the death, and that a reasonable prospect of future benefit is alone sufficient: see the cases collected and discussed by my brother Osler in *Blackley v.*

Toronto R.W. Co., in a note to *Rombough v. Balch*, 27 A.R. 32, at p. 44.

A reasonable prospect of future pecuniary benefit, although somewhat longer postponed, may not unreasonably be regarded as almost as certain in the case of a four year old child as in that of one twice that age. I at least am unable to see how it can be said that in the one case there is evidence proper for a jury and in the other none. If it appeared that the infant was a cripple or an imbecile, or if its age was so tender that there could be no reasonable evidence given of its mental or physical capacity or condition, it would be otherwise. But in the present case the evidence clearly discloses that the infant killed was a bright and capable boy, both mentally and physically, and I, therefore, agree, reluctantly I admit, that there was evidence which could not have been withdrawn from the jury; and the judgment must therefore be affirmed.

MAGEE, J., concurred.

MOSS, C.J.O.:—This appeal raises a question of importance under the Fatal Injuries Act.

The plaintiff sued under the Act to recover damages from the defendants for the death of his son aged four years and three months, occasioned by the negligence of the defendants, and at the trial recovered judgment for \$300.

The judgment was affirmed by a Divisional Court, and the defendants obtained leave to appeal to this Court on the sole question whether there could be a recovery of damages, the child being of such tender age, and no special circumstances touching the question of the right to damages appearing or being found by the jury.

Questions were submitted to the jury, but the only one referring to damages was as follows: "At what sum do you assess the compensation to be awarded to the plaintiff?" To which the jury answered "\$300."

On this branch of the case the evidence which the jury had before them when considering their award of damages was to the following effect. The plaintiff said his son was four years old on the 18th January, and his death occurred on the 9th April following. "Q. What kind of a boy was he physically? A. He was a very healthy child. Q. And how was he intellectually? A. He was remarked for his smartness, and every one that met him or came across him always remarked him for his intellectual abilities. Q. Was he of use to you at all in the house? A. Yes, he was. He was of use to his mother in several ways, such as he was always able to go a message for her if necessary. And other minor things in the house."

Upon cross-examination. "Q. What other children have you? A. Two little girls. He was the only son. Q. Older than he was? A. Yes. Q. And of course he was not going to school or anything of that kind? A. No, he was not going to school just then. Q. And you say he did odd things about the house and ran messages for his mother? A. Yes, little things like that."

A medical man who examined the body after death stated that he estimated him to be three feet nine inches in height and forty pounds in weight and quite healthy. In answer to the question, "What is your business?" the plaintiff replied, "Book-keeper." He was not questioned further as to his means, income, resources, or way of living.

The question is whether upon this evidence the jury acting reasonably could find more than nominal damages. If not, the action cannot be maintained, for the gist of such an action is actual pecuniary damage: see *Boulter v. Webster* (1865), 11 L.T. N.S. 598.

It is quite clear that the measure of damages is not the loss or suffering of the deceased, but the injury resulting from his death to his family.

Ever since the decision of the Court of Exchequer in *Duckworth v. Johnson*, 4 H. & N. 653, it has been treated as undisputed law that an action of this nature cannot be maintained

without some evidence of actual pecuniary damage. Pollock, C.B., said (p. 657): "It appears to me that it was intended by the Act to give compensation for damage sustained, and not to enable persons to sue in respect of some imaginary damages, and to punish those who are guilty of negligence by making them pay costs." Bramwell, B., said (p. 658): ". . . If the jury are solely to judge in such matters in every case where a child is killed, it will be difficult to prevent them from giving damages by way of solatium; whereas, if the plaintiff is compelled to give evidence of the value of the child's services, and the cost of maintaining him, it might keep the matter straight and prevent injustice being done." And Watson, B., said (p. 659): "On one part of the case I have no doubt, namely, that no action can be maintained . . . unless the person proves actual damage. I am clearly of opinion that negligence alone, without damage, does not create a cause of action."

In that case it appeared that the plaintiff's son, a boy of fourteen years of age, had been working and earning wages of four shillings a week for a year or two, but he was out of employment when he was killed. It was left to the jury to say whether his father, the plaintiff, had sustained any pecuniary damage, and they found for the plaintiff with £20 damages. The verdict was upheld on the ground that there was evidence on which a jury might properly infer that there was a reasonable prospect of pecuniary benefit to the father from the continuance of his son's life.

This view had been taken in two previous decisions, *viz.*, *Franklin v. South Eastern R.W. Co.*, 3 H. & N. 211, and *Dalton v. South Eastern R.W. Co.*, 4 C.B.N.S. 296.

In the first of these cases the plaintiff, the father of the deceased, was old and infirm; the deceased, twenty-one years old, was earning good wages and assisted his father in doing the work of carrying up coals to the wards of St. Thomas Hospital, for which the plaintiff was paid 3/6 a week. The jury found for the plaintiff with £75 damages. It was held that the damages

should be calculated in reference to a reasonable expectation of pecuniary benefit as of right or otherwise from the continuance of the life, and, the jury having found that the father had a reasonable expectation of his son's life, the action was maintained, but the verdict of £75 was set aside as excessive. Pollock, C.B., said (at p. 213): "The statute does not in terms say on what principle the action given is maintainable, nor on what principle the damages are to be assessed; and the only way to ascertain what it does, is to shew what it does not, mean. Now it is clear that damage must be shewn, for the jury are 'to give such damages as they think proportioned to the injury.' It has been held that these damages are not to be given as a solatium; but are to be given in reference to a pecuniary loss. . . We do not say that it was necessary that actual benefit should have been derived, a reasonable expectation is enough, and such reasonable expectation might well exist, though from the father not being in need, the son had never done anything for him. On the other hand a jury certainly ought not to make a guess in the matter, but ought to be satisfied that there has been a loss of sensible and appreciable pecuniary benefit, which might have been reasonably expected from a continuance of the life."

In the other case the action was brought for the benefit of the father and mother of the deceased. It appeared that he was twenty-seven years of age and unmarried, and living away from his parents, but he had been in the habit of visiting them once a fortnight, taking them presents of tea, sugar, and other provisions, besides money amounting on the whole to about £20 a year. The jury returned a verdict for the plaintiff, assessing £80 damages for the father and £40 for the mother in respect of the pecuniary loss sustained by their son's death. It was held that the jury were warranted in finding that the father had such reasonable expectation of benefit from the continuance of the son's life as to entitle him to recover damages under the statute.

It is to be observed that in each of these cases there was evidence of earning power, of actual earnings, of willingness to con-

tribute out of their earnings, and in two of them of substantial contributions. Facts were thus supplied from which a jury might properly infer a reasonable expectation of pecuniary advantage from the continuance of the life of the deceased.

The remarks of Pollock, C.B., in *Franklin v. South Eastern R.W. Co.* (*supra*), at p. 214, illustrate this view. After pointing out that damages are not to be given as a solatium nor merely in reference to the loss of a legal right, he proceeded: "If then the damages are not to be calculated on either of these principles, nothing remains except that they should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life. Whether the plaintiff had any such reasonable expectation of benefit from the continuance of his son's life, and if so, to what extent, were the questions left in this case to the jury. The proper question then was left, if there was any evidence in support of the affirmative of it." Having thus defined the nature of the action and the proper question for the jury, and after summarising the evidence, he went on to say what I have already noted: "We do not say that it was necessary that actual benefit should have been derived, a reasonable expectation is enough, and such reasonable expectation might well exist, though from the father not being in need, his son had never done anything for him. On the other hand a jury certainly ought not to make a guess in the matter, but ought to be satisfied that there has been a loss of sensible and appreciable pecuniary benefit, which might have been reasonably expected from the continuance of the life."

So in *Hetherington v. North Eastern R.W. Co.*, 9 Q.B.D. 160, an action by a father for his own benefit for the death of his son aged twenty-nine years, the evidence was that the father was fifty-nine years of age, nearly blind, and almost incapable of working by reason of injuries to his left leg and hands, that the deceased son used to contribute to his support, and five or six years before his death, the father being out of work, had assisted him pecuniarily out of his earnings. The question was whether

there was sufficient evidence of pecuniary injury occasioned to the father by his son's death to sustain the action. It was held by a Divisional Court, overruling the opinion of a County Court Judge, that there was some evidence for the consideration of the jury, and that it was for them to say whether on that evidence there was a reasonable expectation of pecuniary advantage to the father from his son's life, and what, if so, the measure of such expectation was.

In England these principles have been firmly adhered to, and it is safe to say that one may search in vain for a case in which, in the absence of some evidence of the character above indicated, a jury has been instructed that they might find a verdict in favour of the plaintiff.

While, as the instances above referred to shew, it is not absolutely essential to prove the actual receipt of pecuniary assistance or benefit during the lifetime of the deceased, there must be evidence of such a tangible and substantial character as to satisfy a jury that, in the words of Pollock, C.B., "there has been a loss of sensible and appreciable pecuniary benefit, which might have been reasonably expected from a continuance of the life."

Capacity, ability, and willingness to assist may be inferred from the facts shewn, but it seems clear that there must be shewn to exist such a condition of things as will fairly and reasonably lead the mind to the conclusion that a loss has actually been sustained. Otherwise the jury are put in the region of conjecture, they are left to guess, and so they are more likely to punish the wrong-doer than to render the compensation the statute provides for those on whose behalf the action may be brought.

In the instances of actions arising out of the deaths of young persons there has always been an attempt on the part of the plaintiff to shew deprivation of a present actual pecuniary benefit, very slight in some cases, but still tangible, such as the performance of services in the household.

In the comparatively recent case of *Bedwell v. Golding* (1902), 18 Times L.R. 436, the action was by a father to recover

damages for the death of his daughter, eleven years old. Evidence was given that she lived with her father and performed certain household services which enabled him apparently to dispense with a servant. The trial Judge directed the jury on this branch of the case that the plaintiff was only entitled to recover as damages for the loss of his daughter's services the excess value to him of those services over the estimated cost of her keep and general maintenance. The jury assessed the damages on this head at £30.

In *Clark v. London General Omnibus Co.*, reported in the first instance in (1905), 21 Times L.R. 505, and in appeal (1906), 22 Times L.R. 691, and [1906] 2 K.B. 648, the action was by a father to recover for the death of his daughter, twelve years old. On the question of damages the evidence was very similar to that in *Bedwell v. Golding* (*supra*), but there was the additional fact that the girl's schooling was costing nothing. The trial Judge ruled that there was evidence on which the jury might find that there was an excess in value of the services over the cost of maintenance. The jury found, however, that the plaintiff was not entitled to any damages for the loss of his daughter's services. The case went to appeal on other points, and eventually the action was dismissed, but no objection appears to have been made to the way in which the question of damages was put to the jury, nor to their finding thereon.

For a very full discussion of this case see *Jackson v. Watson*, [1909] 2 K.B. 193.

In each of these cases the matter appears to have been dealt with in accordance with the view expressed by Baron Bramwell in *Duckworth v. Johnson* (*supra*), that "if the plaintiff is compelled to give evidence of the value of the child's services and the cost of maintaining him, it might keep the matter straight and prevent injustice being done."

In our own Courts there has been an effort in the case of the death of young persons to prove some present services or assistance, with the view, no doubt, of enabling the jury or other tri-

bunal to come to a conclusion whether or not there was a deprivation of a pecuniary benefit the continuance of which might reasonably be expected. That was done in the well-known case of *Ricketts v. Village of Markdale*, 31 O.R. 610.

The present seems to be the first case in our Courts in which it can be said that there was really no evidence demonstrating a capacity and a willingness on the part of the child to assist the parents, as shewn by his proved acts.

Here there is really nothing on which a jury is to come to a conclusion but the fact of the relationship, the age, the sex, the general health, the intelligence—promising, no doubt, but yet that of an infant—and the death.

The case is really that suggested by Barry, L.J., in *Wolfe v. Great Northern R.W. Co.*, 26 L.R. Ir. 548, at p. 570, of a father coming before the Court saying, "My child has been killed; and if it had lived I should have obtained great pecuniary benefit from its services."

I cannot but think that in a case like the present the jury can only arrive at an award of damages by a process of speculation and by mere guess-work not founded upon premises upon which they can reasonably proceed to estimate compensation in accordance with the principles on which it is to be awarded under the statute.

Support can be found for it in the holdings of the Courts in the United States, but so also can decisions to the contrary.

There are variances from Lord Campbell's Act in the legislation in many of the different States of the Union, and the decisions necessarily appear to be in conflict with the English authorities and with one another.

Indeed some of them would, I venture to think, be a rather startling surprise to the framer of the original Act and to those Judges to whom the object and intent of the legislation was a matter of personal knowledge and who placed a construction on its terms when the matter was new.

I am unable, consistently with the view I hold, to say that the verdict should stand. I think that the appeal should be

allowed, but of course upon the terms upon which the defendants were granted leave to appeal.

MACLAREN, J.A., agreed with Moss, C.J.O.

Appeal dismissed.

Leave to appeal to the Judicial Committee (P.C.) upon the question of the plaintiff's right to damages was refused 16th November, 1909.

JURISDICTION—ORDER—REVIEW, RESCIND OR VARY.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

CITY OF VICTORIA v. ESQUIMALT & NANAIMO RY. Co.

(Application No. 5663.)

Jurisdiction—Public Highway—Crossing—Fenced—Not Legally Closed—Stile Substituted—Acquiescence by City and Public—Order of the Board—Review, Rescind or Vary—Reasonable Convenience of the Public—Conditions as to Safety—Highway to be Kept Open—Railway to Construct—City to Maintain and Make Safe.

On an application to review, rescind or vary a former order of the Board approving the closing of a public highway across the right of way of a railway company and the substitution of a stile therefor.

Held, 1. That conditions have greatly changed since the date of the former order, the reasonable convenience of the public requires the highway to be open, which had never been legally closed.

Held, 2. That the application for the re-opening of the highway should be granted on condition that the railway company construct crossing, the city maintain the same and make such changes in the locality as will render the crossing as safe as may be under the circumstances.

The application was heard at Victoria on the 27th of February, 1909.

W. J. Taylor, for the City of Victoria.

D. S. Tait, for Victoria West.

J. E. McMullen, for the Esquimalt & Nanaimo Ry. Co.

The facts are fully set out in the judgment of the Chief Commissioner.

March 16, 1909. THE CHIEF COMMISSIONER :—The old Esquimalt road was for many years prior to the construction of the Esquimalt & Nanaimo Ry. a public highway leading from the City of Victoria to Esquimalt. At the time of, or prior to the construction of the railway, a new highway was established leading to Esquimalt, but the old road was never legally closed, and has ever since remained and still is a public highway, and is a public street within the limits of the city of Victoria.

In the construction of the railway the grade fell much below the street level, on one side four or five feet; no public crossing was provided and fences were erected along the sides of the right of way, thus closing the street for vehicular traffic. This was done without any apparent authority, but was acquiesced in by the city authorities and the public.

On October 4th, 1907, the railway company applied for leave to maintain, in its then condition, a stile for foot passengers only at this crossing, and the City of Victoria applied for a public crossing. The Board, by an order dated October 8th, 1907, granted the application of the railway company, and refused that of the city.

On January 30th, 1909, the city applied to review, rescind, or vary the order of October 8th, 1907, and the case was heard at Victoria on February 27th, 1909. The Board had an opportunity of viewing the locality in question and of hearing the views of the engineers for the city and the railway company, and of counsel representing the city, as well as the railway company and certain landowners who were affected by the street being closed.

Conditions have greatly changed of late years in that portion of the city, and the reasonable convenience of the public clearly requires the street to be open for public travel. The railway company has had the convenience of having the street closed at this point for many years; but this closing can only be regarded

as temporary and subject at any time to alteration at the will of the city council, if that course seemed reasonable. The crossing will by no means be a safe one for the public, but it is their right to have it opened. The city could have required that when the railway was constructed, and such right still exists. As a term, however, of opening the crossing, the city should require all the standing trees on the lot adjacent to the crossing to be cut down, so a clear view may be had of the railway towards the city. It should also make arrangements to prevent any building or buildings being erected on the vacant lot across the street from that upon which the trees stand, so the view will not be obstructed and trains coming around the curve be prevented from being seen. The railway company must do the necessary grading and planking for the crossing; the city will have to maintain the crossing when constructed.

Upon the city furnishing evidence by affidavit that the trees have been removed, and that binding arrangements have been made that buildings will not be erected on the vacant lot, the formal order may issue.

March 26, 1909. COMMISSIONER McLEAN:—I agree, but am of the opinion that the following should be added: "Near the south-east corner of the proposed crossing there are, as shewn on the plan on file with the Board, two buildings near the right of way, the one which is the most remote being within 100 feet of the right of way. This obstructs the view of those driving up the old Esquimalt road (shewn on the plan as Wilson Street), towards the proposed crossing. The railway company should, at its own expense, arrange to have these two buildings moved to such a distance from the right of way as will, in the opinion of an engineer of the Board, give a reasonably good view of the curved portion of the track to those who are approaching it from the city."

JURISDICTION—PROTECTIVE MEASURES.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.]

BELL TELEPHONE CO. v. NIPISSING POWER CO.

(File No. 12551.)

Jurisdiction—Leave to Cross—Federal and Provincial Companies—Telephone Wires—High Tension Wires—Protective Measures—Public Interest—Railway Act, sec. 246—7-8 Edw. VII. ch. 61, secs. 1, 5.

Application by the Bell Telephone Company, under sec. 246 of the Railway Act and sec. 5 of 7-8 Edw. VII. ch. 61, for an order restraining the Nipissing Power Company, of Toronto, Ontario, from crossing the wires of the applicant, between Powassan and North Bay along the highway, known as the Nipissing Road, with their high tension wires, until permission of the Board shall have been obtained.

Held, 1. That the order should be granted; the provision for protective measures being in the public interest.

2. That under sec. 246 of the Railway Act, power companies are required to obtain leave from the Board, before crossing railways with their wires, in order that the wires may be properly guarded.

3. That under the broad provisions of sec. 5, of the Amending Act, 7-8 Edw. VII. ch. 61, it is reasonable that the provisions of sec. 246 should apply to a telephone system, as well as to a railway line.

4. When a provincial company desires to cross with its line, the line of a Federal company, subject to the jurisdiction of the Board, it must obtain leave from the Board before it will be allowed to do so.

THE application was heard at Ottawa, November 17, 1909.

Lawrence Macfarlane, for the Bell Telephone Co., the applicant.

Andrew Haydon, for the Nipissing Power Co., the respondent.

Lawrence Macfarlane.—Under the provisions of section 246 of the Railway Act and the Amending Act, 7-8 Edw. VII. ch. 61, secs. 1, 5, the Nipissing Power Co. could only place its transmission wires across telephone wires upon obtaining leave of the Board subject to such terms and conditions as the Board might impose.

Section 5 of the Amending Act of 1908 (7-8 Edw. VII. ch. 61), makes the provisions of the Railway Act generally applicable, with the exception of the sections expressly mentioned, in so far as reasonable, to companies within the purview of the amending statute.

By section 1, of the Amending Act, companies are defined as including not only railway companies, but also telephone and telegraph companies operating subject to the authority of the Parliament of Canada.

For the purposes of the application, the word "railway" should be interpreted to mean the lines or wires of a telephone system. There is as much reason for the protection of such telephone wires and cables when crossed by a heavy transmission line, as for the protection of the property of a railway company when crossed in the same manner.

Section 246 of the Railway Act should apply so far as reasonable.

No wires for the conveyance of power or high voltage wires of any kind should be allowed to cross over telephone wires without leave of the Board.

Andrew Haydon:—The Nipissing Power Company is a provincial company and the point of crossing by its line over the telephone line within the legislative authority of the Dominion, must be expressly provided for.

A similar situation when a provincial railway crosses a Dominion railway is especially provided for in section 8 of the Railway Act. There is no such express provision for wire crossings in the Amending Act of 1908. By section 5 of the Amending Act the Railway Act is made to apply to telephone and telegraph companies only, "in so far as reasonably applicable"; it is submitted that no implication can be drawn making the conditions of section 8 apply to wire crossings, unless expressly so stated.

In any event the Act of 1908 in all its substantive sections, applies only to telegraph and telephone tolls, and the other sections of Part I. of that Act are simply for the purpose of carrying

out the application of this tariff provision. Therefore neither expressly nor by implication can it be said that the Amending Act applies to this section.

Reference is made to *Canadian Pacific and Canadian Northern Ry. Cos. v. Kaministiquia Power Co.*, 6 Can. Ry. Cas. 160, at pp. 169 and 170; *Peoples' and Caledon Telephone Cos. v. Grand Trunk and Canadian Pacific Ry. Cos.*, 9 Can. Ry. Cas. 161, at p. 162.

The facts are fully set out in the judgment of the Chief Commissioner.

November 17, 1909. THE CHIEF COMMISSIONER:—This matter is by no means free from doubt, but my brother Commissioner is strongly impressed with the merits of it and is of the opinion that the order should go.

It may be as well to give briefly the reasons why we come to the conclusion that the application should be granted.

The foundation of the Railway Act requiring power companies to get the leave of the Railway Board before they are permitted to cross railways is, I take it, that the crossing of the high tension power wire may be properly guarded with the view of eliminating danger and risk to the public in using the railway. The practice has been that where power wires cross railways under the authority of the Dominion Railway Board, application is made for leave to cross, and after a very great amount of careful study by the electrical engineer of the Railway Board, standard specifications have been adopted that are intended to eliminate, as far as possible, the danger at the crossing, in the event of short circuits or breaks in the high tension power wire.

Now it is not denied that the like or similar danger exists where the high tension power wire crosses a telephone line, and it is clear that the necessity for protective features connected with the high tension wire exists to the like or the same extent that it does where it crosses a railway. So we have the fundamental feature, namely, the protection of the public, in both instances. So that if it was proper in the interest of the public to guard the

railway where the high power wire crosses, it is equally necessary to guard the telephone line at the same point.

But, of course, the necessity for this does not give the Board jurisdiction unless the Railway Act is reasonably clear in conferring jurisdiction at points like the one in question. Now the section that has been referred to by counsel for the applicant, No. 5 of 7 and 8 Edw. VII., makes the Railway Act generally applicable to telephone companies with the exception of certain named sections that appear in the body of section 5. It is left to the Board to say, it seems to us, under the broad provisions of section 5, what sections of the Railway Act (other than those that are expressly named) may reasonably be applicable to telephone companies. If it is in the interest of the public to prevent danger to life and property that protective features should be required where a high power wire crosses a telephone wire, why is it not reasonable that the same protective features should be required at a crossing of that kind as are required where a high power wire crosses a railway line? The section touching wires, 246 of the Act, says that no lines of wires for telegraphs, telephones or for the conveyance of light, heat, power or electricity shall be erected, placed or maintained across a railway without the leave of the Board. I am loth to come to the conclusion, still it seems to me that it is not unreasonable to say that a clause of that kind, appearing in the Railway Act, should have application to a telephone line as well as to a railway line. Some discussion has been had because the respondent here is a provincial corporation. No one in the country entertains stronger views than I do as to the desirability of the line of jurisdiction between the Federal and Provincial authorities being closely lived up to. Personally, I am of the opinion that the Provincial sphere of legislation should be supreme and should be left untouched by any Federal power or any Federal Court or any Federal controlling tribunal. But of necessity where a concern incorporated under Provincial authority crosses a steam railway under the jurisdiction of Parliament, application has to be made by the Provincial company to the Railway Board of Canada for leave

to cross that Federal railway. The same principle applies to the present position. The Nipissing Power Company is incorporated under the Ontario Joint Stock Company's Act. While the Railway Board of Canada should in no way trespass upon the powers conferred by the Ontario statute upon the Nipissing Power Company, yet when the Nipissing Power Company desires, in the furthering of its works, to cross a railway under the jurisdiction of the Parliament of Canada it is compelled to come to the Railway Board for the purpose of getting leave to so cross and this Board has made orders of that kind upon the application of the Nipissing Power Company. If we are right in our construction of the Act, and if these clauses have reasonable application to a telephone company, then it is only asking the Ontario corporation to do the same thing, to take the same steps and follow the same procedure with reference to this telephone company, which is a Federal creature, that it has to do with reference to the crossing of a Dominion railway obtaining its charter from the same Federal source; so it does not seem that arriving at the conclusion that these sections have application to a telephone company in any way trenches upon the rights conferred by the Legislature of Ontario upon the respondents. It is merely requiring them to take the same procedure, the same steps where they desire to extend their works across this telephone line that it is admitted upon all hands they have to take where they are desiring to extend their wires across a Dominion railway. For these reasons we are of the opinion that we are compelled to hold that this section is applicable and that the order should be granted.

If the respondents so desire, in so far as there are any legal questions arising in this application, they may have leave to go to the Supreme Court to have it finally determined whether we are right in the view that we take, and, expressing a personal and selfish view, I shall not be disappointed if the Supreme Court does not form the same opinion of it that we have.

MR. COMMISSIONER MILLS concurred.

JURISDICTION—HIGHWAY ACROSS RAILWAY.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

CITY OF VANCOUVER V. CANADIAN PACIFIC RY. CO.

(File No. 12233.)

Jurisdiction—Foot-bridge Over Railway—Railway Act—Sec. 237 (8-9 Edw. VII. ch. 32, sec. 4).

The city of Vancouver applied for an order permitting it to construct at its own expense a wooden foot-bridge across the tracks of the Canadian Pacific Ry. Co. at the north end of Carrell Street, where a street ends at the south boundary of the railway right of way; the foot-bridge being in continuation northerly of the street and leading to wharves, the property of the railway company, on the water front of Vancouver Harbour. The nearest highway crossing of the railway was several hundred feet distant from the site of the proposed foot-bridge.

The company contended that the Board had no jurisdiction to grant the application, its power being limited to order the erection of a foot-bridge at an existing highway crossing under section 239.

Held, that under section 237 (section 4 of 8-9 Edw. VII. ch. 32) the Board had jurisdiction to grant the application.

Held, that the foot-bridge so erected shall be a highway across the railway.

The application was heard at Vancouver on October 27th, 1909.

W. A. Macdonald, K.C., for the city.

H. J. Duncan, for private parties interested.

J. E. McMullen, for the railway company.

W. A. Macdonald, K.C. The Board have visited the locality. We desire to give evidence shewing the necessity for some means to enable foot passengers to get to the water at this point.

J. E. McMullen. The Board has no jurisdiction to deal with this application.

Carrell Street ends with the south boundary of the railway property.

Under the provisions of section 239 of the Railway Act the Board has jurisdiction to authorize the construction of foot-bridges only where there is a highway crossing.

There is no highway crossing here.

The foot-bridge is to enable persons passing on foot along such highway to cross the railway.

All the wharves and other property north of the railway tracks are the private property of the railway company.

H. J. Duncan. The application is by the city for the security, the safety and convenience of the travelling public. The Board has jurisdiction not only under section 237 but under other sections of the Railway Act.

Under section 257, sub-sec. (d) the Board may require any structure, equipment, to be constructed, maintained and operated for securing the protection, safety and convenience of the public.

Until a year ago this street was open, and used as a means of ingress and egress to and from the wharves (which have been there for twenty-five years), when the railway company closed the street, maintaining that they owned the property in it.

Under the interpretation clause of the Railway Act, sec. 2, sub-sec. 21, "railway" is defined as including a wharf, therefore the foot-bridge is necessary to allow ingress to and egress from the railway to other portions of the railway by which passengers are obliged to travel.

The Board under its general powers must do everything for the security of the public.

It was never intended that the Railway Act should ignore the safety of the public in reaching public waters.

The wharf is a public highway and the proposed bridge is from a highway to that public highway.

November 25, 1909. THE ASSISTANT CHIEF COMMISSIONER:—
Until recently the public used to cross over the railway tracks north of Carrell Street to get to the wharves and steamers in that

vicinity along the water front of Burrard Inlet. This was, undoubtedly, a dangerous practice and the railway company put a fence along the south side of its property to stop it.

The nearest point to Carrell Street where the railway can now be crossed is Columbia Avenue, about six or seven hundred feet east.

The city now wants, at its own expense, to be permitted to construct an overhead bridge for foot passengers only, over the railway tracks where the public used to cross at grade at the end of Carrell Street. As there is a great deal of travel to and from the water front, I think it would be most convenient to the public if this foot-bridge were built.

The railway company submits that the Board has no jurisdiction to grant the application. I do not agree with it.

The Board has ample jurisdiction under section 237 of the Railway Act as it appears in section 4 of chapter 32 of the Statutes of 1909, to authorize a municipality to construct a highway across a railway, and we are given very wide powers to impose terms and conditions. This will be a highway across the railway.

I think the application should be granted and an order go approving of the plans, if they are satisfactory to the engineer of the Board.

MR. COMMISSIONER McLEAN concurred.

JURISDICTION.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

ROGERS V. CANADIAN EXPRESS CO.

(File No. 11068.)

Jurisdiction—Express Company—Damages—Wrong-billing—Negligence—Company's Agent—Provincial Courts—Excessive Tolls—Refund.

On an application to recover damages for the company's alleged negligence in way-billing a skiff to the wrong address, and charging excess tolls for sending it in a roundabout course to its proper destination, it being in dispute who was responsible for the erroneous way-billing.

Held, that the Board had no jurisdiction to entertain the complaint; the complainant must be left to her rights in the Courts.

Held, that the Board could only investigate the error in computing the express tolls of the company, but as the company offers to refund the excess the Board should not interfere.

The application was set down for hearing at Ottawa on the 21st September, 1909, adjourned to the sittings of November 16th, but prior to that date disposed of by the Board without argument.

November 11, 1909. THE CHIEF COMMISSIONER:—I have gone through the correspondence filed in this matter, and it is clear the Board has no jurisdiction to entertain the complaint, and had the matter been brought to my attention earlier, I would have stopped the proceedings at the inception and left complainant to obtain redress, if entitled to any, in the Courts. As the matter stands it is in dispute as to who is responsible for the skiff being way-billed to the wrong address—assuming that if the enquiry were pursued by the Board it was found to have been the neglect of the agent of the express company, the Board could grant no redress because it is not empowered by the Railway Act to direct express companies to make compensation for the negligence, carelessness, or oversight of its officers or agents—these matters remain for the Court to consider.

It will not be gathered from the foregoing that any opinion is being expressed as to who is responsible for the error in way-billing, and reference is made to the matter merely for the purpose of shewing that the Board has no jurisdiction over the claim.

The complainant must be left to pursue her rights in the Courts.

It appears some error arose in computing the express charge, and that feature of the contest is the only one the Board could investigate. The company offers to refund the excess above the proper toll for the roundabout course the skiff took, and so nothing is left for the Board to do but refuse to interfere. If complainant can place the fault upon the company for the error, the Court can afford her adequate relief.

JURISDICTION—TELEGRAPH TOLLS.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

WESTERN ASSOCIATED PRESS V. CANADIAN PACIFIC RAILWAY AND
GREAT NORTH WESTERN TELEGRAPH COS.

(File No. 12002.)

Telegraph Tolls—Not Unreasonably High—Filing Tariffs—Unjust Discrimination—Press Despatches—Traffic—“Passing Over the same Portion of the Line of Railway”—“Toll” or “Rate”—Railway Act, 314(5), 315—7-8 Edw. VII. ch. 61, sec. 9—7-8 Edw. VII. ch. 61, Part 1.

Application by the Western Associated Press for reduction of rates charged by the respondents for press despatches, alleging an unjust discrimination in favour of the respondents' customers. The rates charged from points in Eastern Canada to respondents' customers were one cent per word for day service and one-half cent per word for night service, subject to a rule that those rates are "special for publication at point addressed in one newspaper only." The rates charged to the applicants for the same service were one and one-half cents for day and three-quarters of a cent for night despatches.

- Held*, 1. That the rate made for one class, a single newspaper, should not be arbitrarily applied to another class, an association of newspapers; the different rates not being in themselves unreasonably high.
2. That telegraph companies are brought under the jurisdiction of the Board by 7-8 Edw. VII. ch. 61, Part 1, and their tariffs must be approved by it under section 314(5) of the Railway Act.
3. That these tariffs must be so framed as not to work unjust discrimination against the applicants, or any other person or association, engaged in like work.
4. That section 315 would have no application whatever, unless the traffic (press despatches) in question passed over the same portion of the telegraph line from start to finish.
5. That under section 9 of 7-8 Edw. VII. ch. 61, the definition of "toll" or "rate" has equal application to railway, telegraph and telephone companies.

THE application was heard at Winnipeg, Nov. 15th, 1909.

A. B. Hudson, for the Western Associated Press.

J. A. M. Aikins, K.C., for the Canadian Pacific Railway Company.

J. Paddington, for the Great North Western Telegraph Company.

January 1, 1910. THE CHIEF COMMISSIONER:—On January 2nd, 1894, the following agreement was entered into between the Canadian Pacific Railway Company and the Associated Press:—

“This contract entered into this 2nd day of January, A.D. 1894, by and between the Associated Press, a corporation incorporated under the general laws of Illinois, as party of the first part, and the Canadian Pacific Railway Company of Canada, party of the second part.

“WITNESSETH;

“THAT WHEREAS, the said party of the first part is engaged in the collection and distribution of news for publication in newspapers within the limits of the United States.

“AND WHEREAS, the said party of the second part is engaged in a like business in Canada, and the said parties are mutually desirous of making an exchange of news upon the frontier line between Canada and the United States.

“NOW THEREFORE IT IS AGREED;

“That for and in consideration of the covenants hereinafter agreed to by the said party of the second part, the said party of the first part agrees to deliver its news reports to the authorized representatives of the said party of the second part, at Bangor, in the State of Maine; at Buffalo, in the State of New York; at Detroit, in the State of Michigan; and at Seattle, in the State of Washington, AND to deliver the said reports to no other parties for use within the territory of Canada and the British provinces of North America.

“The said party of the first part hereby agrees to deliver to the said party of the second part the said news reports, at the places indicated above, for use within the territory of Canada and the British provinces only, and the party of the second part binds itself that the news reports shall not be re-transmitted for use in the United States.

The said party of the second part further covenants and agrees that it will deliver free of tolls to the authorized repre-

sentatives of the said party of the first part, such current news of Canada and the British provinces as its agents may collect, at the places indicated above, and to deliver the said news to no other party, or parties, for use within the territory of the United States.

“The said party of the second part further agrees to transmit over its wires in Canada and the British provinces of North America, as promptly as possible, any matter filed with its agents for transmission, and deliver the same to the authorized representatives of the said party of the first part, at the places indicated above, the rates for such transmission to be one-quarter cent per word for all matter filed between 6 a.m. and 6 p.m. and one-eighth cent per word for all matter filed between 6 p.m. and 6 a.m., local time.

“The said party of the second part further agrees to pay the said party of the first part, at its office in New York, the sum of thirty dollars (\$30.00) per week, throughout the life of this contract, the said payment being a partial consideration for the use of the said news of the party of the first part, and in addition as further compensation, shall furnish the news of Canada and the British provinces of North America, as above provided.

“The wires of the party of the second part, or those of the company through whom it makes its connection with the United States, shall be allowed to run into the offices of the party of the first part at the places indicated above, so as to form a direct circuit for the exchange of press between the parties of this agreement. The party of the second part shall be free of rent, and other expenses, excepting telegraph operators at the places indicated above.

“This contract shall continue in force for five (5) years from the date of the signing thereof, and thereafter until annulled by six months' notice for either party.

“WITNESS our hands and seals this 2nd day of January, A.D. 1894.

“Attest:

“Chas. S. Diehl,

“Asst. Sec’y.

“The Associated Press,

“By Melville E. Stone,

“Gen. Mgr.

“The Canadian Pacific R’y. Co.,

“By W. C. Van Horne,

“Prest.,

“C. Drinkwater,

“Sec’y.”

This is said to be still on foot except that the railway company pays some \$6,000.00 per annum instead of the \$30.00 per week as provided for in the contract.

In addition to the news obtained by the railway company from the Associated Press, it is itself, through its agents and correspondents, a newsgathering agency in Ontario and the Eastern provinces, and it has this combined matter for transmission over its telegraph lines.

In September, 1907, the Western Associated Press was formed with headquarters at Winnipeg. It is said that the news service supplied by the Canadian Pacific was unsatisfactory, first, on account of the price, and second, that the newspapers had objections to receiving their telegraphic news through a railway corporation. This Press Association is a co-operative concern, pays no dividends, was not formed for profit, and its revenues are intended only to pay expenses; it serves eleven newspapers situate in and west of Winnipeg, and one at Fort William. It brings telegraphic news to Winnipeg over the lines of the Canadian Pacific Company and the Great Northwestern Telegraph Company, and others, but as to the latter, the enquiry need not be pursued, as the complaint is against the respondents only; this news is sifted out at the applicants' head-

quarters in Winnipeg and distributed by wire to its members, and the questions involved in this discussion are two-fold. 1st, Whether the rates charged by the respondents for the delivery of this press matter to the applicants' headquarters at Winnipeg are discriminatory; and 2nd, whether the rates for the re-transmission or furtherance of the edited or sifted matter supplied by applicants to their members are likewise discriminatory.

There are fourteen newspapers published between Port Arthur and Victoria that are not members of the applicant corporation, and which obtain their telegraph news direct from respondents, or one of them. This division of the Western Press between the applicants and respondents may be more fully appreciated from the following table:—

Applicants' Members.

Winnipeg Free Press,
Winnipeg Telegram.
Winnipeg Tribune.
Brandon Sun.
Regina Leader.
Moose Jaw Times.
Moose Jaw News.
Calgary Herald.
Edmonton Bulletin.
Saskatoon Capital.
Fort William Herald.
Edmonton Journal.

Respondents' Customers.

Port Arthur Chronicle.
Fort William Times Journal.
Regina Standard.
Saskatoon Phoenix.
Lethbridge Herald.
Calgary News.
Calgary Albertan.
Nelson News.
Vancouver News Advertiser.
New Westminster Columbian.
Nanaimo Free Press.
Nanaimo Herald.
Victoria Colonist.
Victoria Post.

Mr. Nichols, president of the applicants, stated at the hearing that they did not ask for reduction of press rates, but were asking for equalization of rates; in other words, it is the contention of the applicants that their members are being discriminated against, and that the established practice of the respondents works in favour of the newspapers published by their

customers and against those whose proprietors are members of the applicant association.

The existing press rate of both respondents from points in Eastern Canada to Winnipeg is one cent per word for day service and one-half cent per word for night service, and this has been the rate for some years. These rates are modified by certain rules that confine their application to "*special for publication at point addressed in one newspaper only.*" So from this it is clear the respondents did not intend these special press rates should apply upon matter addressed to a Press Association, which is not a newspaper, and which matter would not be confined in its publication to one newspaper only.

The rates charged to the applicants from points in Eastern Canada are one and one-half cent per word for day service, and three-quarters of a cent per word for night service.

From the foregoing list, there does not seem to be a newspaper in Winnipeg that is supplied by the respondents at their press rate of one cent per word day and one-half cent night service; all the papers there that use the telegraph service appear to be members of the applicant association; so in so far as Winnipeg itself is concerned, it is difficult to see how respondents treat any one else or any other corporation in a more favoured manner than they treat the applicants, and there is no newspaper at Winnipeg, or any publishing corporation there that is discriminated in favour of as against the applicants.

But let us deal with the larger question advanced by the applicants, should the respondents be required to furnish to the applicants telegraphic matter at the tolls or rates established by them for delivery to and publication in one newspaper? The telegraph company may properly, and in the public interest, establish low rates upon telegraphic matter to newspapers; it is proper they should be permitted to surround such rates with reasonable rules. When they fixed the one cent day rate and one-half cent rate, these were reasonably low rates; at any rate they were not complained against, nor do the applicants now com-

plain against them. These rates were established by the telegraph companies upon the understanding that they should be paid by each newspaper in Winnipeg accepting delivery of telegraphic news, and that such matter should be confined in its publication to that one paper. Assuming the rates established reasonable ones, was there anything unreasonable or unfair in this safeguard? Had this not been provided for, supposing there had been ten papers in Winnipeg at the time the rates went into effect, the next day they could have banded together, taken one message only, distributed copies among themselves and deprived the companies of ninety per cent. of the revenue they might have reasonably expected, and the receipt of which was an element in fixing the low rate. And is this not in effect what is asked by the applicant? Is it reasonable that a rate made for and intended to apply to one class of traffic should be arbitrarily required by this Board to apply to an entirely different class?

The argument that the cost of transmission is the same is not the controlling factor. It is true that the cost of transmission to the applicants of a given number of words may be the same as the cost to an individual newspaper at Winnipeg; but the applicants are not entitled to avail themselves of the press rate provided for the individual paper, because in the first place the framers of the rate had not such a condition of business in mind; no press association at Winnipeg or in the west was in existence at the time the rate was promulgated; and secondly because had it been considered, it was perfectly open to the companies to make one rate to an individual paper and a higher rate to a Press Association, so long as neither of them was excessive. The Railway Equality Clauses must be read, so far as applicable, to telegraphic traffic. Again, supposing there were ten newspapers in Winnipeg that would take news from the companies at the one cent and one-half cent rates, the actual traffic would be ten copies from the telegraph office in Winnipeg—one to each paper. The length of each might differ; some might take one class of matter and others other classes. There would pro-

bably be six or seven times the volume of matter that would leave Winnipeg telegraph office in the case of these ten subscribers, than would leave in the event of the ten amalgamating and taking one message only, breaking it up among themselves as they might choose; and yet it is argued that it is not open to the company to charge a lesser toll upon this larger volume. The answer is that sub-section 3 of section 315 provides that the tolls for larger quantities or greater numbers may be proportionately less than the tolls for smaller quantities or lesser numbers. Again, the message to an individual paper, limited to publication in that paper alone, is not, when compared with a message to a Press Association intended for publication both locally and for breaking up and distribution to a large number of points, "*traffic of the same description*," nor are "*the circumstances and conditions*" connected with these two distinct classes of traffic "*substantially similar*." One of the controlling portions of this section is the words "*passing over the same portion of the line of railway*." In the present mixed up condition of the Railway Act, arising by amendments covering telegraph and telephone companies, and leaving clauses drawn for application solely to railway companies to be made applicable, so far as possible, to telegraph and telephone companies, this clause (315) would have no application whatever, unless the traffic in question passed over the same portion of the telegraph line from start to finish. How this may be with reference to all this news matter that finds its way to Winnipeg as a central point, we do not know, nor was it developed in argument.

In our opinion, the Board should not arbitrarily apply the single newspaper press rate to the applicants. This opinion is based entirely upon the proposition that the press rate of one cent and one-half cent, and the rate to applicants of one and a half cents and three-quarters cent are not in themselves unreasonably high. In other words, we do not think the law requires the respondents to grant the applicants the press rate without the burden of the rules framed by respondents regarding the use to

be made of the service. It was not argued that these rules as applied to the individual papers were unreasonable. The rules and the rate were intended to be read together; and it does not seem at all reasonable to compel the companies to separate them and apply the rate to something they and no one else had in contemplation when the rates were made.

There were submitted at the hearing statistics and figures shewing press rates in the United States and in England. This, we presume, was done for the purpose of shewing the existing rates were too high; but statistics of this sort are of no value unless it is also shewn what the volume of traffic is that moves under these rates, and what the profit is, if any; cost of labour, expense of maintenance, life of plant under varying conditions, are all most important factors, and all must be known to make a rate in one country of any value as a comparison in another.

The second branch of this application presents entirely different and much more difficult features.

The applicants have a quantity of matter at Winnipeg that they wish to distribute to their members at the above points, and they say they and their members are discriminated against by respondents in that the respondents as a news-gathering and distributing agency places itself in competition with the applicants, and delivers longer dispatches to their customers in places where applicants have members, at lower tolls than are charged the applicants or their members. Take a concrete case as put by Mr. Dafoe at the hearing. In Saskatoon the applicants have a member and the respondents a subscriber or customer, both evening papers. The applicants' member would have to pay \$507 to obtain from the applicants the same service that the respondents furnish its subscriber for \$200. Now this disparity may and does exist at all places to which applicants and respondents distribute news. It is caused by the respondents giving a *flat rate* to their subscribers and applying a rate per word to applicants' members. That it works out in serious discrimination against the applicants and their members, there is no doubt.

Respondents contend they are within their right, and that no law can stop them. They say in the one case they sell to their subscriber the commodity, viz., the news, delivered, at a flat rate; that the payment is for the commodity; while in the case of the applicants the payment by their customer is for the transmission, and not for the commodity; and from this it is argued that the conditions are different.

It was said that these low flat rates were given by the telegraph company in the early days to build up papers in new towns and cities, that settlers and others might have telegraphic news from the outside world, the system grew up long before the government established control over telegraph rates and facilities, was no doubt proper enough in its inception, became established and the continuance of it practically became a necessity, although the loss of this news service over the Western telegraph lines of the Canadian Pacific Railway Company was estimated at nearly \$40,000 per annum.

The question for consideration is what change, if any, must be made in this custom by reason of the statute passed with the object of placing telegraph companies under the jurisdiction of this Board. The Toll and Tariff Clauses of the Railway Act have equal application to telegraph companies, and to the telegraph operations of railway companies having authority to construct and operate telegraph lines, as to railway companies; and telegraph companies and railway companies operating telegraph lines are required to file tariffs of tolls for telegraph service in the same manner that railway companies are required to file their tariffs for railway traffic; and the definition of "toll" or "rate" in section 9 of the Act of 1908, has equal application to railway, telegraph and telephone companies.

If the Canadian Pacific Railway Company had in the early days established a system of flat rate contracts for transporting traffic, say, from Montreal to Western points, could these contracts stand in the face of the toll clauses of the Act? Could a flat rate contract by a railway company to deliver a commodity

of its own transported from Montreal to a Western point stand as against a shipper from Winnipeg of a like commodity with a discriminating rate against the latter? and if not as to a railway company, why as to a telegraph company?

In the written argument put in by the respondents after the hearing the following appears: "A railway company may sell its surplus coal at so much per ton to residents at Winnipeg, and what it cost to haul that surplus coal to Winnipeg need not enter into the price. The sale price of the coal sold under those circumstances need not be considered on a complaint as to the rate charged by the railway company for hauling coal to Winnipeg. The two matters are absolutely separate and distinct, and bear no relation to each other."

Let us pursue this coal illustration. Suppose a railway company has a coal (news gathering) mine at Montreal, and the applicants have a like mine at Winnipeg, and Saskatoon is an important point of consumption; can the company deliver its commodity to the Saskatoon consumer at \$4 per ton, including both the value of the commodity and cost of haul, and charge the Winnipeg producer \$5 per ton for hauling alone? If this were permissible the railway companies owning coal areas could close up every mine but their own; and in like manner telegraph companies could put out of business every newsgathering agency that dared to enter the field of competition with them, if it were lawful for them to use the public utilities that are entrusted to their operation, viz., the telegraph lines and stations, upon a system of flat rate contract irrespective of cost or rate of transmission.

It seems clear that these flat rate contracts must be based as well upon cost of transmission and delivery as of collection or gathering, and that tariffs of tolls covering all this class of service must be filed; these tariffs must be so framed as not to work discrimination against the applicants, or any other person, or association, engaged in like work. It is no answer to say the service in the past has been performed at a loss—the question

is solely one of the legality of the practice. It seems clear that the Act prevents its continuation and it must be discontinued.

Tariffs should be filed by February 1st, 1910. Order accordingly.

JURISDICTION—UNREASONABLE TOLLS.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

DAVY V. NIAGARA, ST. CATHARINES AND TORONTO RY. CO.

(File No. 11965.)

Jurisdiction—Tariff—Increase in tolls—Refund.

On a complaint that the tolls on wood pulp should be reduced from three cents per hundred pounds in carloads to two cents the latter rate having been in force for many years, and for a rebate of tolls paid under the former tariff.

The railway company submitted that the increase was justified on account of the increased cost of operation and that the former toll did not give sufficient revenue to pay operating expenses.

Held, upon the evidence that the increased toll should be disallowed; the two cent toll being fair and reasonable.

Held, that the increased toll being lawful according to the tariff in force when the complainant's shipments moved, the Board had no jurisdiction to grant a refund.

THE application was heard at Toronto, December 2, 1909.

The applicant, in person.

F. H. Phippen, K.C., for the Niagara, St. Catharines & Toronto Ry. Co.

The facts are fully set out in the judgment of the Assistant Chief Commissioner.

December 17, 1909. THE ASSISTANT CHIEF COMMISSIONER:
—Mr. James Davy, a wood pulp manufacturer at Thorold, On-

tario, applied to the Board for an order reducing the rate on wood pulp, in carloads, from Thorold, Ontario, to Suspension Bridge, New York, from three cents, the rate according to the present tariff (C.R.C. 442) to two cents per hundred pounds, which was the rate in effect for many years prior to the year 1908.

Mr. Davy also asks that the railway company be ordered to refund him the sum of \$219.83, being the additional one cent per hundred pounds paid on 42 carloads shipped from November 15th, 1908, when the three cent rate went permanently into effect, to September 29th, 1909, the date of his application. On this branch of the case Mr. Davy was told at the hearing that as the three cent rate was the lawful rate according to the tariff effective during that period when his shipment moved, that the Board has no jurisdiction to grant his request. The only point therefore which we have now to decide is, whether the rate should be reduced from three to two cents.

It is admitted that for many years the rate was two cents. On February 1st, 1908, it was raised to three cents, and reduced again to two cents from April 25th, 1908, to November 14th, 1908, to permit the manufacturers to fulfil some contracts. Finally, on November 15th, 1908, the present three cent rate became effective.

When a rate which has been in force for a considerable time is increased by a railway company, it is incumbent on the company to justify the increase when it is attacked before the Board. This justification of the increase should be by definite positive evidence. In this case, the only evidence given by the company was that of Mr. Paul, its general freight agent. The witness in answer to the question put by the counsel for the company, as to why the roads raised the rate from two to three cents, said:—

“It has been felt for at least since I have been in charge of the traffic on the Niagara, St. Catharines and Toronto, that a rate of two cents was not sufficient so far as we were concerned.

Not sufficient revenue covering the business, the carrying of it principally on account of the expensive bridge. And further, which of course covers part of it, not carrying any of the raw product in, it was felt by the lines interested that two cents was not sufficient."

Upon being asked by Mr. Commissioner McLean had he found any specific cost of service increase, Mr. Paul said:—

"Our wage bills to train employees have increased. The cost per diem has increased. Formerly we used to pay only 12 cents a car for a movement over our line. At the present time, at the time that first increase was contemplated or made we were paying 50 cents per day, afterwards reduced to 25 cents."

He was then asked:—

"Had you any specific increase of cost in this particular service? A.—Not that service any more than in our general cost."

Mr. Paul then gave it as his opinion as a railway man that:—

"Two-thirds of two cents (the old rate) is not sufficient to pay the ordinary expenses in connection with the handling of the freight."

The first reason given for the increase was, that when Mr. Paul took charge of the traffic of the company, it was felt that the recent rate was too low. Mr. Paul was several years in his present position with the two cent rate in effect before any effort was made to increase it.

The next reason was, that the old rate did not give "sufficient revenue covering the business, the carrying of it, principally on account of the expensive bridge."

This is not very satisfying evidence, as Mr. Paul had previously stated that he could not even roughly state the cost of the bridge. And also, as the bridge was on the Michigan Central part of the route and that company's share is only one-third of the rate. The Niagara, St. Catharines and Toronto want two-thirds of a cent more for service on its own line, because the

Michigan Central have an expensive bridge on the part of its line over which the rate in question is effective.

The third reason given for the increase was, that as the railways interested did not carry any of the raw product, it was felt that two cents was not sufficient.

We were then told that the wages were increased from 12 cents a car for a movement over the line to 50 cents at the time the increase in the rate was contemplated; but that this was afterwards reduced to 25 cents. But, we were not given details of any specific increase of cost in this particular service, although they were asked for.

Mr. Paul was, of course, trying to give us the best evidence he could when he gave us his opinion that the two cent rate was not sufficient to pay the ordinary expenses in connection with the handling of the freight. If the company desired however to make a point out of the question of the cost of operation, it should have submitted details of the expense of operation when the two cent rate was in effect and details of its operation under the three cent rate for comparison.

It is unnecessary to analyse the evidence further. It does not, in my opinion, satisfactorily rebut the presumption that the two cent rate was a fair and reasonable rate.

The company having failed to justify the increased rate, it should be disallowed, and the old two cent rate re-established.

THE CHIEF COMMISSIONER and MR. COMMISSIONER McLEAN, concurred.

HIGHWAYS ACROSS RAILWAY.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

TOWNSHIP OF CALDWELL v. CANADIAN PACIFIC RY. CO.

(File No. 10637.)

Highways Across Railway—Railway to Open and Bear Expense—Road Allowances—Reservation by Crown.

On application by a municipality for a highway crossing over the line of the Canadian Pacific Railway Company at the expense of the railway company on the town line between two townships where no road allowances had been reserved in the original survey, but under this system of survey, when patents issue, a reservation of five per cent. is made for roads, with the right in the Crown to lay out same, where necessary or expedient.

Held, in view of such reservation by the Crown, that the railway company should be repaired to bear the expense of opening the highway across its right of way.

THE application was disposed of on the material filed with the Board.

The facts are fully set out in the judgment of the Chief Commissioner.

December 8, 1909. THE CHIEF COMMISSIONER:—The township of Caldwell asks for a highway crossing over the line of the Canadian Pacific Railway on the town line between the townships of Caldwell and Springer, the railway company consents, but submits that it should be at the cost of the township of Caldwell as to construction, maintenance, and operation. This the township declines and asks for the disposition of this question of cost.

There has been much correspondence upon the matter, from which it would appear that the townships of Caldwell and Springer were surveyed in the year 1880, the former by R. H. Coleman, O.L.S., and the latter by J. K. McLean, O.L.S. The railway was constructed at the point in question in 1883, and

the plans of the survey do not shew any reservation of road allowance, as such, along or between the boundaries of these townships.

It has been well settled that municipalities asking for leave to open new streets or highways over railway lines are required to bear the expense connected therewith, but the railway companies have not been allowed, nor so far as I know have they ever asked for compensation for these lands used for such roads or streets.

The Minister of Crown Lands for Ontario informs the Board that the surveys of the townships of Springer and Caldwell shew no road allowances along either the boundaries, or the concessions or side lines, but that, under this system of survey, when patents issue, a reservation of five per cent. of the total area is made for roads, with the right in the Crown to lay roads out where necessary or expedient.

The railway line then was constructed through these townships with the knowledge of this practice of the Department of Crown Lands. Of course, the location of roads had not been defined at the time of construction, but that there must at some future time be highways somewhere was known, and that the five per cent. was being, or would be withheld by the Crown from settlers for such purpose was also known; so if the plan had shewn a highway between these townships, the company, in that event, would have had to bear the expense of opening the road, why should the same principle not apply where the company knows the Crown will reserve a portion of the land for highways, to be located at proper and convenient points in the future? It is no greater burden upon the railway company in one case than in the other; in the one the company knows that it may be at some future time called upon to bear the expense of opening a highway; in the other it knows of the five per cent. reservation in each Crown deed, but the exact point of location of highway is not known. Along the tier of lots on the boundary line between these townships the five per cent. is kept

out for highways; it was known this would be done, so it is no hardship to require the railway company to bear the expense of opening a highway along this boundary where the same crosses the railway right of way. This should be made to comply with the standard of highway crossings, and if the work cannot be done this winter, it should at least be completed by June 1st, 1910.

HIGHWAY CROSSINGS—GRADE CROSSING FUND.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

TOWNSHIP OF WALPOLE V. THE GRAND TRUNK RY. CO.

(File No. 9437.)

Highway Crossings—Gates—Grade Crossing Fund—Contribution by Municipality—Railway Act, secs. 238 and 239(a).

Application by the municipality for an order requiring the company to place gates at a highway crossing already protected by an electric bell. It was shewn that this crossing was particularly dangerous owing to obstructions to the view, the heavy traffic both on highway and railway, and the bell being constantly out of repair.

Held, that the company should instal and maintain gates at this crossing. *Held*, that twenty per centum of the cost of installation should be payable from "The Railway Grade Crossing Fund."

Held, that ten per centum of the cost of operation be borne by the municipality.

THE application was heard at Toronto, April 27, 1909.

J. Y. Murdoch, for the municipality.

M. K. Cowan, K.C., for the company.

January 6, 1910. THE CHIEF COMMISSIONER:—On the 17th of June, 1904, the township of Walpole made an application before the Board for an order requiring the Grand Trunk Railway Company to place a watchman, during the daytime, at the highway crossing where the Air Line crosses the Port Dover Plank

Road. The hearing was continued on the 25th of June, 1904, and as a result of the application the railway company was required to install an electric bell. This was done and the bell has been the only protection that has since existed at this crossing.

It is not denied that the crossing is extremely dangerous. A mill on the south-west corner and a hotel and trees on the north-west corner, obstruct the view. There are four tracks that the public have to cross in driving to and coming from Jarvis; and within the last two or three years the Grand Trunk Railway Company in constructing its new station built it on the north side of the main line, whereas it formerly stood on the south side, and this requires all passengers coming to the station from the village and returning to the village from the station to pass over three tracks.

Complaints have repeatedly come to the Board that this bell is generally out of working order, and consequently a menace instead of a protection.

The matter was again heard before the Board at Toronto, on the 27th of April last, and disposition of it was delayed in order that the railway company might furnish statistics of dates of inspection of the bell, and as to the condition that the same was found to be in by their signal engineer.

It was afterwards shewn by this statement that between the 25th of April, 1908, and the 25th of April, 1909, the bell had been found to be out of working order no less than ten times; twice in October; twice in November; three times in December; once in March, and twice in April. Various reasons are given; mostly the cause is set down as being broken bond wires. Why this state of affairs should have been in existence so long here, it is difficult to understand.

There is a large amount of railway traffic at this point.

When the application was heard on the 25th of June, 1904, it was shewn that on the preceding Friday forty trains had crossed this road, twenty-two of which did not stop. They were mostly fast Wabash freight and passenger trains running at a

high rate of speed. On one day in the week preceding the 25th of June, a record was kept, and there were one hundred and sixty vehicular conveyances and three hundred pedestrians crossed the railway tracks.

The volume of traffic has not diminished. Apparently the attempted protection by means of an electric bell is a failure.

The Board caused the crossing to be inspected by one of its officers and his recommendation was that the electric bell did not afford sufficient protection, and he thought gates should be installed; and I am of the same opinion.

I do not know the specific terms under which the Wabash Railroad Company operates over this section of the Grand Trunk Railway Company; but it is the latter company only that the Board must look to to afford protection at this point. It is only fair to say, however, if it has any bearing on the matter as between the two companies, that this order would not be made were it not for the fast trains operated by the Wabash which do not stop at Jarvis. The Grand Trunk operations there would not require the establishment and operation of gates.

The danger is greatly enhanced by reason of the location of the hotel, the trees surrounding it, and the mill. It was said that even when the bell was in operation that the running of the mill prevented to some extent the ringing of the bell being heard.

For these reasons, the municipality should contribute towards the expense of maintaining these gates; and the order will be that the Grand Trunk Railway Company, within thirty days, file with the Board plans for the location of gates at the point in question, and install and fully equip the same within ninety days after the approval of the said plans.

That thereafter the railway company shall maintain and operate these gates between the hours of seven in the morning and eight in the evening, and that there be paid out of the railway grade crossing fund twenty per cent. of the cost of installing the gates and equipment; and that after the said gates are installed and commenced to be operated, the township of

Walpole shall pay to the Grand Trunk Railway Company ten per cent. of the cost of the operation of the said gates; that these payments shall be made upon accounts being presented by the railway company to the township of Walpole, monthly or quarterly as the parties may arrange.

I am directing, in the meantime, that the gates be operated only from seven in the morning until eight in the evening, because when the application was originally before the Board, counsel for the township asked that a watchman be on duty only during these hours, and stated that after eight o'clock traffic at the highway was very limited. If, however, at any future time, it be found that these gates should be operated between the hours of eight in the evening and seven in the morning, the township shall have leave to make an application to have such extended operation.

SWITCHING CHARGES.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

GRAND TRUNK RY. CO. v. CHRISTIE, HENDERSON & Co.

(File No. 9171.)

Switching and Handling Traffic—Fixing Tolls—Absorption—Competitive Plants—Similar Treatment—Special Charge—Railway Act, sec. 315(4).

Application of the railway company to fix the toll for switching and handling traffic to and from the respondents' spur, two and a half miles north of Hespeler. The applicants relied on a similar order made in the case of the Pilon spur on the Canada Atlantic Railway near Casselman, where an additional charge of \$3.00 per car was allowed, on the increased cost of construction, on the increased cost of operation on account of grade, and that the \$3.00 per car which the respondents had paid under protest did not cover cost of operation. The respondents contended that they were not bound by the Pilon order, of which they had no notice, there was a discrimination of \$6.00 per car as compared with free service to competitive plants between stations on the line from Guelph to Galt.

Held, that under sec. 315(4) of the Railway Act it is required that all competitive industries should be treated alike.

Held, that the railway company were not entitled to make an extra charge for switching services.

The application was heard at Toronto, October 16th, 1909.

M. K. Cowan, K.C., for the Grand Trunk Ry. Co.

The respondents, Messrs. Henderson & Christie, appeared in person.

November 10, 1909. **THE CHIEF COMMISSIONER:**—It was stated at the hearing that the railway company made no charge for switching services at many other industries situated as that of Messrs. Christie, Henderson & Co.'s is. Some of these were competitive plants. When the Board made the order requiring the company to put this spur in, provision was made for the payment of a switching charge, but there was then no information furnished to the Board that it had been the custom of the company for many years to perform the like service without making an extra charge,—the law requires all to be treated alike and it is absurd for the Board to require Messrs. Christie, Henderson & Co. to make payments for services that the railway company makes no charge for at other industrial plants.

An order must go declaring that the railway company is not entitled to make any extra charge for switching performed at the spur in question.

MR. COMMISSIONER MILLS concurred.

JOINT TARIFF—COMPETITION.

CANADA.]

[BOARD OF RAILWAY COMMISSIONERS.

BONNERS' FERRY LUMBER CO. v. GREAT NORTHERN RY. CO.

(File No. 11143.)

Joint Tariff—Competition—Intermediate Point—Continuous Route—Basing Point—Collection of Tolls Illegal—Railway Act, secs. 314(5), 315(5), 335.

On a complaint that the Great Northern Railway Company charged higher tolls from Nelson to Gateway, B.C., than from the same point to Fernie, B.C., or Spokane, in the United States, the distance from Nelson to Fernie, via Canadian Pacific short line being 197 miles, by Great Northern 476 miles.

The goods were shipped from Nelson (the basing point) at a toll based on a combination of tolls on Spokane, thereby making a joint tariff and through toll by a continuous route over Canadian and foreign lines.

A joint tariff at a through rate over a continuous route between Gateway and Nelson, B.C., had not been filed as required by sec. 335.

Held, that under sec. 315(5) of the Act, although Gateway is an intermediate point, Fernie is a competitive point; the charging of a higher local toll to Gateway than the through toll to Fernie was not a violation of this sub-section.

Held, that under secs. 314(5) and 335 of the Act, the failure to file a joint tariff with the Board, rendered the collection of tolls illegal.

THE application was disposed of on the material filed with the Board.

The facts are fully set out in the judgment of Mr. Commissioner McLean.

September 27, 1909. MR. COMMISSIONER McLEAN:—The Bonners' Ferry Lumber Company of Bonners' Ferry, Idaho, purchased some small lots of goods from the branch of the Ash-down Hardware Company located at Nelson. These goods were shipped from Nelson and billed by the initial carrier to Gateway, B.C. The depot at Gateway is on the international boundary; part of the depot being in British Columbia and the other part in Montana.

Gateway is a point intermediate to Fernie. The short line

C.P.R. mileage from Nelson to Fernie is 197 miles, while by the Great Northern route over which the goods moved, the distance from Nelson to Fernie is 476 miles. In meeting the short line mileage no necessary obligation is created to apply the same basis on intermediate distances not subjected to the same short line mileage competition.

It is stated that the applicants were assured that the shipments would move from Nelson to Gateway, B.C., on the Fernie rate. The goods moved on this rate and payment of charges on this basis was apparently accepted. Later there was a refusal to protect this rate and the applicants were billed for under charges. No tariff basis either for so applying the Fernie rate or for the under charges over which contest arises is any where before us. The applicants contend that the charging of a higher rate for the intermediate distance to Gateway, B.C., as compared with a lower rate on the longer haul to Fernie is in violation of the "long and short haul" clause contained in sub-sec. 5 of sec. 315 of the Railway Act. But the Fernie rate is a competitive one, and this contention advanced by the applicants must fail.

The question is, what, if any rate, was available for the movement between Nelson and Gateway, B.C. The Fernie rates and the rate the applicants were subsequently asked to pay are as follows:—

	<i>Fernie rate.</i>	<i>Rates subsequently billed.</i>
1st class.....	83c.....	\$4.32
2nd class.....	69c.....	1.83
4th class.....	41c.....	1.30

The assistant traffic manager of the Great Northern Railway states that the rates from Nelson to Gateway, B.C., are based on combinations on Spokane. It also appears that a basing point rate made up of a combination of Nelson-Fernie and Fernie back to Gateway, B.C., may be built up. Goods might move under either of the following combinations:—

Combination on Spokane.

	1st C.	2nd C.	3rd C.	4th C.
Nelson-Spokane.....	\$1.25	\$1.06	\$0.88	\$0.75
Spokane-Gateway, B.C....	1.10	.94	.77	.66
	<hr/>	<hr/>	<hr/>	<hr/>
	\$2.35	\$2.00	\$1.65	\$1.41

Combination on Fernie.

Nelson-Fernie.....	\$0.83	\$0.69	\$0.55	\$0.41
Fernie-Gateway, B.C....	.54	.48	.38	.29
	<hr/>	<hr/>	<hr/>	<hr/>
	\$1.37	\$1.17	\$0.93	\$0.70

From the examples given above, it will appear that neither of the combinations will explain how the rate dealt with in the bill for undercharges was arrived at.

To my mind the material point is the admission of the assistant traffic manager of the Great Northern in his letters of August 5th and August 10th, 1909, on file with the Board, that the Great Northern has no through rate between Nelson and Gateway, B.C.

Section 335 of the Railway Act states that:—

“When traffic is to pass over any continuous route from a point in Canada through a foreign country into Canada, such route is operated by two or more companies whether Canadian or foreign, the several companies shall file with the Board a joint tariff for such continuous route.”

The matter falls within the scope of this section.

(1) There is a continuous route.
 (2) The provisions as to operation by two or more companies, whether Canadian or foreign, are met because we have a route made up as follows:—

- (a) Nelson & Fort Sheppard Railway to the boundary.
- (b) Spokane Falls & Northern, thence to Spokane.
- (c) Great Northern, thence to Rexford.

(d) Montana & Great Northern, thence to the boundary.

(e) Crow's Nest Southern, to destination.

The mandatory provision of this section that a joint tariff shall be filed as a condition precedent to the traffic passing over the continuous route in question has not been complied with. Not only is there not at present a through rate between Nelson and Gateway, B.C., there never has been filed with the Board a tariff of class or other rates between these points. The collection of tolls between Nelson and Gateway, B.C., is, until sec. 335 is complied with, in clear violation not only of this section, but also of sec. 314, sub-sec. 5;

“nor shall the company charge, levy or collect any money for any services as a common carrier, except under the provisions of this Act.”

The tariffs on file with the Board shew that no joint tariff from Nelson covers the stations on the Crow's Nest Southern from Gateway, B.C., to Cedar-Valley Lumber Company's spur inclusive. Whether traffic passes between Nelson and these points does not appear.

From the correspondence on file it would appear that the neglect to comply with the provisions of sec. 335 is to some extent due to a confusion as to the respective terms of the Railway Act and of the Act to regulate commerce. No order need at present issue. It is sufficient to state that until the provisions of sec. 335 are complied with, it is illegal to collect tolls on the traffic falling within the scope of the section.

The other members of the Board concurred.

END OF VOLUME IX.

DIGEST OF CASES.

ABSORPTION.

Terminal Charges — Competition Between Ocean Ports and Carriers — United States and Canada—Refunds—Retroactive Order.] — See TERMINAL CHARGES.

ACQUIESCENCE.

By City and Public—Jurisdiction of Board—Highway Crossings — Fences — Not Legally Closed — Stile — Substitute — Order—Review, Rescind or Vary —Reasonable Convenience of the Public—Conditions as to Safety —Highway to be Kept Open—Railway to Construct—City to Maintain and Make Safe.]—See HIGHWAY CROSSINGS, 1.

ADMINISTRATOR.

Workmen's Compensation — Right to Give Notice Before Issue of Letters — Ignorance of Law.] — See MASTER AND SERVANT, 1.

AGREEMENT.

For Use of Siding—Construction — Protection of Railway from Animals — Negligence — Gate Left Open—Escape and Destruction of Animals—Impli-

cation of Terms in Contract.]— See ANIMALS AT LARGE, 7.

ANIMALS AT LARGE.

1. *Fence Ordinance (N.W.T. 1903, 2nd session, ch. 28), secs. 2, 7 — Railway Act (R.S.C. 1906), ch. 37, sec. 254—Damage to Crops by Animals Gaining Access from Right of Way—Liability of Railway Company—Right of Way Not Fenced.]—*Section 254 of the Railway Act requires the railway to fence its right of way under certain conditions, and sub-sec. 3 provides "such fences . . . shall be suitable and sufficient to prevent cattle and other animals from getting on the railway." Section 427 provides that "every company omitting to do any act or thing required to be done . . . is liable to any person injured thereby for the full amount of damages sustained by such omission."

Held, that where the railway company had not fenced its right of way adjacent to the plaintiff's lands, and cattle came in on such lands and caused damage to crops by reason of the company's neglect to erect fences, the railway company is

liable notwithstanding that the rest of the lands are not enclosed by a "lawful fence." Remarks on Fence Ordinance (N.W.T. 1903, 2nd session, ch. 28), sub-secs. 2, 7. *Winterburn v. Edmonton, Yukon & Pacific R.W. Co.*, 1.

2. *Railway Law—Railway Act* [R.S.C. (1906) ch. 37], secs. 254, 427—*Fences—Omission to Fence Right of Way—Liability of Company for Damage to Adjoining Landowner Occasioned by Animals Gaining Access from Right of Way—History of legislation — Fence Ordinance* (N.W.T. 1903, 2nd session, ch. 28), secs. 2, 7—*Pleading—History and Effect of Pleas of "Not Guilty," and "Not Guilty by Statute"*—*Necessity of Noting in Margin Statutes Relied on—Construction of Statutes.*]—*Per CURIAM*: — Where a statutory duty is imposed, neglect of the duty gives the party damnified thereby a right of action, unless the person damnified is excluded from a particular class of persons who are alone intended to be benefited by the statute.

The fences required to be erected by the railway company under sec. 254 of the Railway Act [R.S.C. (1906) ch. 37] are for all purposes which they may serve, and consequently, by virtue of sec. 427, the company is liable for all damage of what-

ever kind resulting from the omission to fence.

Held, affirming the judgment of Harvey, J., ante p. 1, that: "Where the railway company had not fenced its right of way, adjacent to the plaintiff's lands, and cattle came in on such lands, and caused damage to crops, by reason of the company's neglect to erect fences, the railway company is liable notwithstanding that the rest of the lands are not enclosed by a 'lawful fence.'"

Per Stuart, J.:—The Fence Ordinance (N.W.T. 1903, 2nd session, ch. 28) has no application to a case where it is the duty of the person charged with damage to maintain that portion of the fence through which animals doing damage have entered. It makes no difference whether the rest of the lands are fenced or not.

History and effect of the pleas of "Not guilty," and "Not guilty by statute," traced and discussed.

The necessity of noting in the margin of the plea, the statute permitting the plea, and the particular statute relied on, discussed, with remarks *ab inconvenienti* in respect of these pleas: *Toll v. Canadian Pacific R.W. Co.*, 1 Alta. L.R. 244, 8 Can. Ry. Cas. 291, *quære*. *Winterburn v. Edmonton, Yukon & Pacific R.W. Co.*, 7.

3. *Defective Fence—Cattle at Large—Animal Killed by Fall-*

ing from Railway Bridge—Railway Act, secs. 2, 254, 294, 295, 306, 427—16 Vict. ch. 37, sec. 2.]

—A heifer, while being fed in the stable of an hotel adjacent to the defendants' railway, escaped into the yard of the hotel and from thence on to the defendants' railway through a defective fence. The animal was pursued along the track by the man who had her in charge, till she came to a bridge, and falling through, fell a distance of about 30 feet to the ground beneath and was so severely injured that she had to be killed.

Held, that the defendants were not liable under the Railway Act, sec. 427 (2), the animal not having been killed by the defendants' train. *Young v. Erie & Huron R.W. Co.*, 27 O.R. 530, followed. *Douglas v. Grand Trunk R.W. Co.*, 27.

4. *Railways—Sheep Escaping to Adjoining Farm and Thence Upon the Railway Track—Injury Thereto—Opening Under Gate at Farm Crossing—Openings also in Fence.*]—The plaintiff's sheep, without any negligence on his part, escaped from his farm into that of the adjoining owner, through which the defendants' railway ran, and thence having got upon the railway track were killed. There was a gate at a farm crossing on the adjoining owner's farm which had been raised by the

defendants at the request of such adjoining owner, leaving an opening under the gate sufficient for the sheep to get through. There were also openings in the fence through which the sheep could have got upon the track; but there was no finding of the jury as to the place at which the sheep got upon the track.

Held, that the defendants were liable under sec. 294(4), even assuming that the sheep got upon the track through the opening under the gate.

The effect of the words contained in the section, namely, "at large whether on the highway or not," is that the section is not limited to cattle being at large on the highway and thence getting upon the railway premises. *Higgins v. The Canadian Pacific R.W. Co.*, 34.

5. *Railway — Fences — Statutory Obligation as to—Gap Left in Fence—Animals—Injury to—When "at Large"—Contributory Negligence—Proximate Cause—Cause of Action—Lands — Enclosed and Either Settled or Improved—Onus of Proof—Dominion Railway Act, secs. 254, 294, 427.]*—The plaintiffs had leased a field, on which they pastured their horses, adjoining the track of the defendants' railway, from which it was separated by a fence erected by the defendants, in which they

had left a gap, through which the horses strayed on to the track, where they were run down by a train and killed.

Held, that the horses were not "at large" within the meaning of sec. 294 of the Railway Act, R.S.C. 1906, ch. 37, which was in force at the date of the accident, and which does not cover the case of such owners as the plaintiffs, who were using their pasturing land adjoining the railway track in the usual manner for the purpose of keeping and feeding their cattle, nor could such owners be considered as "suffering" their animals to "enter upon" the railway, and so losing their right of action under sec. 295(e).

(2) There is no express provision in the present Railway Act equivalent to sec. 16 of the Consolidated Railway Act of 1879, as amended by 46 Vict. ch. 24, sec. 9 (D.), under which it was decided in *Davis v. Canadian Pacific R.W. Co.* (1886), 12 A.R. 724, that the question of contributory negligence did not arise where the proximate cause of the damage was the omission of the railway company to make or maintain fences as required by the statute.

(3) Notwithstanding the absence of an express provision such as is above referred to, the defendants were liable to the plaintiffs for the damages sustained by them, by reason of the

duty imposed upon the defendants by sec. 254 of the Railway Act to "erect and maintain upon the railway" fences "suitable and sufficient to prevent . . . animals from getting on the railway," for breach of which duty a statutory right of action against the company is given by sub-sec. 2 of sec. 427 of the Act, to any person injured, for the full amount of damage sustained thereby.

(4) *Primâ facie* the fence was erected by the company in accordance with their statutory obligation to do so where the lands through which the railway passes are "enclosed and either settled or improved" (sec. 254, sub-sec. 4); and the onus lay on the defendants to shew that at the time when the fence was erected, it was not "required" by the Act.

New Brunswick R.W. Co. v. Armstrong (1883), 23 N.B.R. 193, approved and followed.

Judgment of Clute, J., affirmed. *McLeod v. Canadian Northern R.W. Co.*, 39.

6. *Railway — Obligation to Fence Right of Way—Railway Act, R.S.C. 1906, ch. 37, secs. 254, 427 — Injury to Crops Caused by Cattle Straying from Railway Line not Fenced.*—The duty of a railway company to provide, under sec. 254 of the Railway Act, R.S.C. 1906, ch. 37, fences and cattle guards suit-

able and sufficient to prevent cattle and other animals from getting on the railway, is prescribed only to protect the adjoining land owners from loss caused by their animals being killed or injured on the track; and, notwithstanding the general language of sec. 427 of the Act which gives a right of action to anyone who suffers damages caused by the breach of any duty prescribed by the Act, an adjoining owner whose crops are injured by cattle straying on to his land from the railway track, in consequence of the absence of fences and cattle guards, has no right of action against the railway company in respect of such injury.

James v. G.T.R. (1901), 31 S.C.R. 420; *Gorris v. Scott* (1874), L.R. 9 Ex. 125, and *McKellar v. C.P.R.* (1904), 14 M.R. 614, followed.

Winterburn v. Edmonton Ry. Co. (1908), 8 W.L.R. 815, not followed.

Richards, J., dissented. *Hunt v. Grand Trunk Pacific Railway Co.*, 365.

7. *Railway — Agreement for Use of Siding — Construction — Protection of Railway from Animals — Negligence — Gate Left Open — Escape and Destruction of Animal — Implication of Terms in Contract.*]—A siding was constructed by the defendants from the main line of

their railway to the plaintiffs' mills, which stood in a two-acre enclosure bounded on one side by the defendants' fence. At the point where the siding entered the plaintiffs' land the defendants constructed and maintained a gate across the siding and connected with the fence on each side; this gate was usually kept shut by the defendants' servants except when taking cars to or from the mills, but it was not alleged that there was any agreement that the defendants should keep it shut. The gate was left open by the defendants' servants on one occasion after they had removed a car from the siding, and the plaintiffs' horse, which was loose in the two-acre yard, escaped through the gate and was run over by a train of the defendants on the permanent way. In an action to recover damages for the loss of the horse, the jury found that the injury was caused by the negligence of the defendants' servants in leaving the gate open. A clause in the agreement between the parties concerning the use and maintenance of the siding provided that the plaintiffs should "protect the railway of the company from cattle and other animals escaping thereupon from such portion of the siding as may be outside of the lands of the company."

Held, that this meant that the plaintiffs should keep ani-

mals from escaping from that part of their lands occupied by the siding to the property of the company; the defendants owed no duty to the plaintiffs to keep their animals away from the line of railway; the placing of the gate by the defendants, their custom of closing it, and the complaints of the plaintiffs that it was sometimes left open, could not create such a duty; and, therefore, there could be no negligence on the part of the defendants.

Per Riddell, J., that in the construction of the agreement it was of no significance that the clause above quoted was in the printed form of the defendants, a great part of the form having been struck out and much matter written in; also, that the practice of importing implied terms into a contract is a dangerous one; and there could be no implication here of a condition that the plaintiffs would be relieved from the agreement if the defendants left the gate open.

Judgment of the County Court of Middlesex affirmed; Britton, J., dissenting. *Woodburn Milling Co. v. Grand Trunk R.W. Co.*, 374.

8. *Railways—Cattle at Large—Competent Person—Boy of Ten—Judgment—R.S.C. 1906, ch. 37, sec. 294.*]—Section 294 of the Railway Act, R.S.C. 1906, ch. 37, enacts that “no horses

. . . or other cattle shall be permitted to be at large upon any highway within half a mile of (its) intersection with any railway at rail level, unless . . . in charge of some competent person . . . to prevent their loitering . . . on such highway . . . or straying upon the railway.

“(3) If the horses . . . of any person which are at large contrary to . . . this section are killed . . . by any train at such point of intersection . . . he shall not have any right of action against any company in respect of the same being killed or injured.”

The plaintiff, a farmer, sent a lad about ten years old to take fourteen cows along a public highway and across the defendants' line of railway. A train of the defendants ran over and killed four of the cows, and the jury found negligence on the part of the defendants, and also that the boy was a “competent person” within the meaning of the above section.

Held, that the plaintiff was entitled to judgment. *Sexton v. Grand Trunk R.W. Co.*, 119.

APPEAL FROM AWARD.

See EXPROPRIATION, 2.

Requirement of Plans—Railway Act, secs. 158, 177, 217, 220—Expropriation—Injunction—Undertaking to Comply with

Act—Plan Filed of Land Subsequently Sub-divided—Practice — Judgment — Persona Designata—Stated Case — Admission of Counsel.]—See EXPROPRIATION, 4.

Practice — Expropriation — Railway Act, sec. 220—Judgment of Court Acting Without Jurisdiction — Res Judicata — Trespass — Nominal Damages — Costs.]—See EXPROPRIATION, 5.

ARBITRATION.

Railway — Compensation Awarded for Lands Taken—Interest—Jurisdiction of Arbitrators—Possession Taken by Company under Warrants of Possession — Payment of Money into Court — Payment out — Rate of Interest.]—The power conferred on arbitrators appointed under the Railway Act, R.S.C. 1906, ch. 37, to award compensation for lands taken by a railway company is limited to determining the amount of such compensation merely; and, therefore, they exceeded their jurisdiction in awarding interest on the amounts allowed as compensation from the date with reference to which the same were ascertained, namely, the date of the filing of the plan, etc.

Re Canadian Northern R.W. Co. and Robinson (1908), 17 Man. L.R. 396, approved of; Re Cavanagh and Canada Atlantic R.W. Co. (1907), 14 O.L.R. 523, dissented from.

Cases decided under the arbitration sections of the Municipal Act distinguished.

Prior to the making of the awards, possession of the lands was taken by the railway company under warrants of possession issued by a Judge, payment into Court being then made by the company of sums deemed sufficient to satisfy the compensation to be awarded.

Held, that the owners were entitled to have paid to them, out of the moneys in Court, not only the amounts of the compensation awarded, but also interest thereon, not limited to such interest as, according to the practice of the Court, is payable on moneys in Court, but at the legal rate of interest, namely, five per cent., payable from the date of the warrants of possession until the date of the payment out.

Re Lea and Ontario and Quebec R.W. Co. (1885), 21 C.L.J. 154; Re Taylor and Ontario and Quebec R.W. Co. (1886), 11 P.R. 371, and Re Philbrick and Ontario and Quebec R.W. Co. (1886), 11 P.R. 373, referred to and discussed. In re Clarke and Toronto, Grey and Bruce R.W. Co., 290.

Ratification of Award — Expropriation by Railway Company — Costs — R.S.Q. 5164.]—See EXPROPRIATION, 1.

Expropriation—Appointment of Clerk to Arbitrators—Appeal from Award — Payment of Clerk's Fees out of Deposit — Railway Act, secs. 152, 162, 171.]

—See EXPROPRIATION, 2.

See STREET RAILWAYS, 4.

BAGGAGE.

See LUGGAGE.

BILL OF LADING.

Contract — Carrier — Carriage by Water—Bill of Lading — Weights and Measures — Bushel — Canadian Standard or American Standard — Applicability of — Compulsory Payment — Freight — Action for Excess—Contract by Telegram.]

—An agreement was completed in Canada with an American steamship company to carry oats from a port in Ontario to one in the United States, "at the rate of 2½ cents per bushel," and the master of the vessel, as agent of the steamship company, accepted the cargo as measured by weight on the Canadian standard of 34 pounds to the bushel, and so indicated on the bills of lading signed by him at the port, which stated "rate of freight as per agreement."

Held (Magee, J., dissenting), that the Canadian standard and not the American standard of 32 pounds to the bushel was to be applied to the contract.

Where, on delivery by vessel of cargo, freight in excess of the

amount due was paid as demanded, without protest.

Held, that nevertheless such payment was not voluntary, since, if it had not been made, expenses for storage, with possibly demurrage and loss by reason of non-delivery to purchasers, would have been incurred; and the excess paid was recoverable by action.

A contract by telegram is made at the place where the telegram of acceptance is sent from. *Melady v. Jenkins Steamship Co.*, 78.

Carriers of Goods — Delivery Without Surrender of Goods — Condition — Claim for Loss — Time — Breach of Contract — Quantity — "More or Less."]—See CARRIERS OF GOODS, 2.

BREACH OF CONTRACT.

Bill of Lading — Delivery Without Surrender of — Claim for Loss — Time — Quantity — "More or Less."]—See CARRIERS OF GOODS, 2.

BRIDGE.

Over Railway—Railway Crossings—Jurisdiction of Board—Railway Act, sec. 237 (8 & 9 Edw. VII. ch. 32, sec. 4).]—See HIGHWAY CROSSINGS, 2.

BUSHEL.

See BILL OF LADING.

CANADIAN OR AMERICAN STANDARD.

See BILL OF LADING.

CARRIERS OF GOODS.

1. *Carriers — Lost Luggage—Contract of Carriage—Receipt—Condition Limiting Liability—Notice—Agents of Owner—Alteration of Oral Contract—Negligence — Damages.*—The defendants were an incorporated company, a main part of whose business was to carry and deliver baggage or luggage for customers, to and from railways, steamboats, and other public conveyances. The plaintiff, who was a passenger on a steamer, on his arrival at the wharf in Toronto handed the steamer check for his trunk to his father-in-law, R., to have the trunk sent up to R.'s house. R., who was an employee in the Customs, handed the check to H., also a Customs officer, and asked him to pass the trunk and have it sent up to the house. H. gave D., the defendants' agent on the wharf, the check and twenty-five cents which R. had given him, told him to have the trunk sent up to R.'s house, and walked away. D. then gave the money to S., a soliciting agent of the defendants, and proceeded to take the steamer check off the trunk. H. returned in about fifteen minutes after he had left the check and the money with

D., and asked him for a receipt for the trunk. S. then wrote out the receipt and handed it to H., who looked at but did not read it, nor was his attention called to any terms upon it—he knew, however, that the defendants were in the habit of giving receipts upon taking over baggage for transfer. About an hour and a half thereafter H. handed the receipt to R., who passed it on to the plaintiff, who did not read it till about ten days afterwards. The receipt was a document which had legibly printed on its face a notice by which the defendants agreed to receive and forward the articles for which the receipt was given, subject to a condition that they should “not be liable for any loss or damage of any trunk . . . for over \$50.” The receipt was in a form generally used by the defendants in the course of their business, and no proof was given that their agents who did the work of receiving and receipting for baggage had authority to receive it on any other footing. The trunk was lost or stolen; but without negligence on the part of the defendants. The defendants tendered to the plaintiff \$50 as in full discharge of their liability under their contract, which the plaintiff refused, and brought this action.

Held, Meredith, J.A., dissenting, that the plaintiff was entitled to recover the full value

of the trunk and its contents, inasmuch as the defendants, who as common carriers were liable to their customer for the full value of the property entrusted to their care, in the absence of notice, brought home to the customer, that their liability was limited to a certain sum, had failed to discharge the onus which lay upon them to shew that the plaintiff at the time when he made his contract with the defendants had received notice that their liability was limited, or that the stipulation limiting their liability had been at any time accepted by him as a term of his contract.

Harris v. Great Western R.W. Co. (1876), 1 Q.B.D. 515; *Henderson v. Stevenson* (1875), L.R. 2 H.L. Sc. 470, and other cases bearing on the liability of carriers for loss or damage to luggage discussed.

Per Meredith, J.A., that the question whether the plaintiff had accepted the condition limiting the defendants' liability was one of fact, and the finding of the trial Judge in favour of the defendants should not be reversed unless plainly shewn to be wrong on the evidence.

Judgment of a Divisional Court, reversing the judgment of Boyd, C., at the trial, affirmed. *Lamont v. Canadian Transfer Co.*, 387.

2. *Railway—Carriers of Goods—Bill of Lading—Delivery of*

Goods Without Surrender of—Condition—Claim for Loss—Time—Breach of Contract—Quantity—"More or Less."—A bill of lading of the defendants, covering wheat shipped, provided that its surrender should be required before delivery of the wheat, and that claims for loss or damage must be made in writing to the defendants' agent at point of delivery promptly after arrival of the wheat, and if delayed for more than thirty days after such delivery, or after due time for delivery, the defendants should not be liable in any event.

Held, that the failure to make such claim in writing within the time specified did not relieve the defendants from liability resulting from breach, not of their contract of affreightment, but of their contract to deliver the wheat to the holder of the bill of lading and to no one else.

Where, therefore, the defendants had delivered the wheat without obtaining surrender of the bill of lading,

Held, that the defendants were liable to the consignor to the value of the number of bushels of wheat expressed in the bill of lading to have been received by them, but not for any more, although more had been actually shipped, and the words "more or less" in the bill of lading did not, in the circumstances, affect the matter.

Mercer v. Canadian Pacific R.W. Co. (1908), 17 O.L.R. 585, distinguished. *Tolmie v. Michigan Central R.W. Co.*, 336.

Bill of Lading—Carriage by Water—Weights and Measures—Canadian or American Standard of Bushel—Applicability of—Compulsory Payment—Freight—Action for Excess—Contract by Telegram.]—See BILL OF LADING.

Delivery to Consignee—Seizure by Railway Company for Unpaid Tolls—Railway Act, secs. 3, 4 and 5—Seize—Termination of Carriers' Lien—Demand—Conversion.]—See TOLLS, 1.

CARRIERS OF PASSENGERS.

1. *Husband and Wife—Action of Tort for Personal Injuries to Wife—Joinder of Parties—Action by Husband for Loss of his Wife's Services—Joinder of Causes of Action—Common Law Procedure Act, 1852, sec. 40—English Order 18, Rule 4—Railway Law—Negligence—Combination of Circumstances Constituting Negligence—Access for Passengers to Cars—Length, Lighting and Protection of Platform—Nature and Measure of Damages.]—Per Stuart J.:—Where a married woman sues in tort to recover damages for personal injuries, and not in respect*

of either her separate, real or personal property, it is not only proper to join the husband as a party plaintiff, but if he is not joined the defendant can insist upon the joinder, either by motion in Chambers or summarily at the trial of the action.

The husband has a right of action in himself alone for the loss of the services of his wife occasioned by such injury. The wife herself has no cause of action arising from such loss, and she cannot be joined as a party plaintiff with the husband in such form of action.

The individual action of the husband for loss of services can be joined with the action of the husband and wife jointly for general damages for the injury suffered by the latter.

Semble, that the Common Law Procedure Act, 1852, sec. 40, is in force in Alberta, and *quære* whether English Order 18, Rule 4, is in force here or not.

Where passengers are impliedly invited by a railway company to make use of a platform as a means of access to the railway cars, it is the duty of the railway company to have the platform in a reasonably safe condition at all points, or parts where such passengers are entitled to be or stand; consequently where the plaintiff sustained injuries by attempting to board a passenger car of the defendant railway company by

falling over the unprotected end of the platform, the night being dark and the platform badly lighted, without any carelessness or contributory negligence on her part; *Held*, by Stuart, J., that the company were liable for negligence in not having the platform in a reasonably safe condition; and *semble*, that it made no difference whether the platform were well lighted or not.

Circumstances to be considered in estimating damages for personal injuries, etc., discussed.

Per Curiam.—While an act or a circumstance under ordinary conditions may not constitute negligence, under other circumstances or in other conditions it may amount to negligence, or in other words that there may be negligence in the combination.

Held, therefore, that the combination of circumstances in this case, namely, a long night train drawn up at a short platform inadequately lighted, so that passengers attempting to board the train were not free from danger of accident, constituted actionable negligence on the part of the railway company.

Judgment of Stuart, J., affirmed. *Swan v. Canadian Northern R.W. Co.*, 251.

2. *Railway—Injury to Passenger—Latent Defect in Wheel of Car—Derailment—Negligence—Liability.*] — The plaintiff

brought this action for injury sustained by her owing to the breaking of a flange in the hind wheel of a car of the defendants, on which she was a passenger, on the occasion of an excursion, causing partial derailment and her violent ejection. The flange broke because of an inherent defect in the shape of an airhole at the time of the manufacture of the wheel. The defendants did not shew what tests had been applied by the manufacturers of the wheel, or what could be done to detect the flaw; neither did they shew that they themselves made any proper examination of the wheel before using it.

Held, that the defendants had failed adequately to discharge their duty of examining thoroughly and skilfully the equipment furnished for the excursion, and were liable.

Judgment of Clute, J., affirmed. *Gaiser v. Niagara, St. Catharines and Toronto R.W. Co.*, 286.

CARS.

Access for Passengers to.]—*See* CARRIERS OF PASSENGERS, 1.

CAR SERVICE.

See TOLLS, 5.

CASES FOLLOWED, DISTINGUISHED AND DISCUSSED.

Almonte Knitting Co. v. Canadian Pacific R.W. Co., 3 Can. Ry. Cas. 441, followed, p. 209.

Attorney-General for Trinidad v. Enriche, 63 L.J.P.C. 6, [1893] A.C. 518, 1 R. 440, 69 L.T. 505, referred to, p. 354.

Blackley v. Toronto R.W. Co. (1897), 27 A.R. 44n, followed, p. 449.

Brant Milling Co. v. Grand Trunk R.W. Co., 4 Can. Ry. Cas. 259, followed, p. 233.

British Columbia Pacific Coast Cities v. Canadian Pacific R.W. Co., 7 Can. Ry. Cas. 125, discussed, p. 209.

Canadian Manufacturers Association v. Canadian Freight Association, 7 Can. Ry. Cas. 302, distinguished, p. 175, discussed, p. 224.

Canadian Northern R.W. Co. and Robinson, In re, 17 Man. L.R. 396, 8 Can. Ry. Cas. 226, approved of, p. 290.

Canadian Pacific R.W. Co. v. Little Seminary of St. Therese, 16 S.C.R. 606, referred to, p. 342.

Cavanagh and Canada Atlantic R.W. Co., In re, 14 O.L.R. 523, 6 Can. Ry. Cas. 395, dissented from, p. 290.

Gorris v. Scott (1874), L.R. 9 Ex. 125, followed, p. 365.

Harris v. Great Western R.W. Co., 1 Q.B.D. 515, discussed, p. 388.

Henderson v. Stevenson, L.R. 2 H.L. Sc. 470, discussed, p. 388.

Hendrie v. Toronto, Hamilton & Buffalo R.W. Co., 27 O.R. 46, followed, p. 341.

James v. Grand Trunk R.W.

Co. (1901), 31 S.C.R. 420, followed, p. 365.

Lancashire Patent Fuel Co. v. London and North Western R.W. Co., 12 Ry. & C. Tr. Cas. 79, followed, p. 32.

Lasalle Paper Co. v. Michigan Central R.W. Co., 16 I.C.C. Rep. 149, followed, p. 233.

Lea and Ontario & Quebec R.W. Co., In re, 21 C.L.J. 154, discussed, p. 290.

Marsan v. Grand Trunk Pacific R.W. Co., 9 Can. Ry. Cas. 341, distinguished, p. 354.

McKellar v. Canadian Pacific R.W. Co. (1904), 14 M.R. 614, followed, p. 365.

Mercer v. Canadian Pacific R.W. Co., 17 O.L.R. 585, 8 Can. Ry. Cas. 372, distinguished, p. 336.

New Brunswick R.W. Co. v. Armstrong, 23 N.B.R. 193, followed, p. 39.

Parkdale, Corporation of, v. West, 12 App. Cas. 602, 56 L.J. P.C. 66, 57 L.T. 602, followed, p. 341.

Philbrick and Ontario & Quebec R.W. Co., In re, 11 P.R. 373, discussed, p. 290.

Pym v. Great Northern R.W. Co. (1862), 8 B. & S. 759, followed, p. 449.

Stockton and Middlesborough Water Board v. Kirkleatham Local Board, [1893] A.C. 444, distinguished, p. 271.

Taylor and Ontario & Quebec R.W. Co., In re, 11 P.R. 371, discussed, p. 290.

Toll v. Canadian Pacific R.W. Co., 8 Can. Ry. Cas. 291, discussed, p. 7.

Willets v. Watt & Co. (1892), 2 Q.B. 92, discussed, p. 423.

Winterburn v. Edmonton R.W. Co. (1908), 8 W.L.R. 815, not followed, p. 365.

Young v. Erie & Huron R.W. Co., 27 O.R. 530, followed, p. 27.

CHARTER OF RAILWAY COMPANY.

Order of Board—Review, Rescind, Change, Alter or Vary—Jurisdiction — Approval — Location — Registration — Plan — Profile — Book of Reference — Compensation — Present Value—Railway Act, secs. 26, 30, 158, 7 & 8 Edw. VII. ch. 62, sec. 29.]—See JURISDICTION OF BOARD, 2.

CLAIM FOR LOSS.

Bill of Lading—Delivery of Goods—Without Surrender of—Condition — Time — Breach of Contract — Quantity — “More or Less.”]—See CARRIERS OF GOODS, 2.

CLASSIFICATION.

Foreign Carrier—Joint Tariff—Exception—Continuous Route—Through Rate—Local or Special Commodity Rates—Excessive Rates—Refund—Railway Act, secs. 317, 321 (sub-secs. 2, 3, 4), 323, 333, 334, 336, 338.]—See TARIFF, 1.

CLERK.

Appointment of, to Arbitrators — Expropriation — Appeal from Award.]—See EXPROPRIATION, 2.

CLOSING HIGHWAY CROSSINGS.

Not Legally—Jurisdiction of Board — Stile — Substitute — Acquiescence by City and Public — Order — Review, Rescind, or Vary—Reasonable Convenience of the Public—Conditions as to Safety — Highway to be Kept Open—Railway to Construct—City to Maintain and Make Safe.] — See HIGHWAY CROSSINGS, 1.

COMPENSATION.

Expropriation — Persons Interested — Renewable Lease — Occupation After Expiration of Term Without Renewal—Tenancy at Will—Right to Renew for Part—Railway Act, 155.]—See EXPROPRIATION, 3.

Present Value — Charter of Railway Company — Railway Act, secs. 26, 30, 158; 7 & 8 Edw. VII. ch. 62, sec. 29.]—See JURISDICTION OF BOARD, 2.

Arbitration — Interest—Rate of—Jurisdiction of Arbitrators — Possession Taken by Company Under Warrants of Possession — Payment of Money into Court — Payment Out.]—See ARBITRATION.

COMPETENT PERSON.

Animals at Large—Railway—Boy of Ten—Judgment—Railway Act, sec. 294.]—See ANIMALS AT LARGE, 8.

COMPETITION.

Of Railways and Market Rates in United States—Blanket Rates—Local and Proportional Rates—Discrimination—Fair and Reasonable Rates—New Tariffs with Connection in United States.]—See TOLLS, 3; DISCRIMINATION, 1, 2.

Joint Tariff—Intermediate Point—Continuous Route—Basing Point—Collection of Tolls—Railway Act, secs. 314(5), 315(5), 335.]—See TARIFF, 3.

Between Ocean Ports and Carriers—United States and Canada—Refunds—Retroactive Order.]—See TERMINAL CHARGES.

COMPULSORY PAYMENT.

Carriage by Water—Bill of Lading—Freight—Action for Excess—Contract by Telegram.]—See BILL OF LADING.

COMPULSORY TAKING.

Allowance for—Arbitration—Street Railway Act, sec. 41.]—See STREET RAILWAYS, 4.

CONDITIONS.

Fair and Reasonable—Jurisdiction of Board—Installation of Telephones in Railway Sta-

tions—Public Convenience—Exclusive Contract—Provincial Companies to be Bound by Contract—Fair and Reasonable Conditions—Railway Act, sec. 245.]—See TELEPHONES, 1.

CONSTITUTIONAL LAW.

Jurisdiction of Board—Telephone Wires—High Tension Wires—Leave to Cross—Protective Measures—Public Interest—Railway Act, sec. 246, 7 & 8 Edw. VII. ch. 61, secs. 1 and 5.]—See TELEPHONES, 2.

Competition—Joint Tariff—Intermediate Point—Basing Point—Collection of Tolls—Railway Act, secs. 314(5), 315(5), 335.]—See TARIFF, 3.

CONSTRUCTION AND OPERATION.

See TARIFF, 2.

CONSTRUCTION OF STATUTES.

Fence Ordinance (N.W.T.).]—See ANIMALS AT LARGE, 2.

16 Vict. ch. 37, sec. 3—Railway Act, 6 Edw. VII. ch. 42.]—See TOLLS, 2.

Fire from Locomotive—Damage to Standing Bush—Conflicting Evidence—Findings of Jury—Railway Act, sec. 298—Lands—Plantations.]—See FIRES, 2.

CONTINUOUS ROUTE.

Foreign Carrier—Joint Tariff — Classification — Exception — Through Rate — Local or Special Commodity Rates — Excessive Rates — Refund — Railway Act, secs. 317, 321 (subsecs. 2, 3, 4), 323, 333, 334, 336, 338.]—See **TARIFF**, 1, 2.

CONTRACT.

Use of siding—Protection of Railway for Animals.] — See **ANIMALS AT LARGE**, 7.

Jurisdiction of Board—Installation of Telephones in Railway Stations—Public Convenience — Provincial Companies to be Bound by Contract—Fair and Reasonable Conditions—Railway Act, sec. 245.] — See **TELEPHONES**, 1.

CONTRACT OF CARRIAGE.

Lost Luggage — Receipt — Conditions Limiting Liability — Notice — Agents of Owner — Alteration of Oral Contract — Negligence — Damages.]—See **CARRIERS OF GOODS**, 1.

CONTRIBUTION.

Of Cost—Railway Crossing—Jurisdiction of Board—Party Interested — Municipality — Distance from Work.] — See **JURISDICTION OF BOARD**, 1.

CONTRIBUTORY NEGLIGENCE.

See **STREET RAILWAYS**, 3.

Statutory Obligation as to Fences—Gap Left in Fence—Injury to Animals — Proximate Cause—Lands Enclosed, Settled or Improved—Onus of Proof—Railway Act.]—See **ANIMALS AT LARGE**, 5.

CONVERSION.

By Railway Company — Termination of Carriers' Lien — Carriage of Goods — Seizure by Railway Company for Unpaid Tolls — Railway Act, secs. 3, 4 and 5—Seize.]—See **TOLLS**, 1.

COSTS.

Expropriation by Railway Company — Ratification of Award — R.S.Q. 5164.]—See **EXPROPRIATION**, 1.

Practice — Expropriation — Railway Act, sec. 220—Appeal — Judgment of Court Acting Without Jurisdiction — Res Judicata—Trespass — Nominal Damages.]—See **EXPROPRIATION**, 5.

CROPS.

Destruction of — Sparks from Locomotive — Marsh Hay Cut and Baled—Railway Act, sec. 298.]—See **FIRES**, 4.

Damage to Crops—Absence of Fence — Fence Ordinance (N.W.T.).] — See **ANIMALS AT LARGE**, 1, 2, 6.

DAMAGES.

Personal Injuries—Permanent

Disability — Pecuniary Loss — Quantum — Judge's Charge — Address of Counsel to Jury — Mentioning Sum Claimed.] — The plaintiff, though not originally trained as a mining engineer, had by long experience become an expert examiner of gold mining locations; was 37 years of age, physically strong and healthy, and of excellent character. He was in receipt of a salary of \$6,000 a year from employers interested in gold properties, who spoke very highly of his capabilities and prospects. He was permanently disabled by injury sustained on one of the defendants' cars through their negligence. A jury awarded him \$30,000.

Held, on appeal, that the amount was not so excessive as to entitle the defendants to a new trial.

Held, also, that by a reference in the charge to the jury to \$25,000 as a sum which would not appear large to a man earning \$6,000 a year, and by a mention of the sum claimed as \$50,000, the jury were not, reading the charge as a whole, left under the impression that they were directed as to the amount they were to fix.

Held, also, that counsel for the plaintiff, in opening to the jury, mentioning the sum claimed in the statement of claim, was not so objectionable as to be a ground for granting a new trial.

Judgment of Anglin, J., affirmed. *Bradenburg v. Ottawa Electric R.W. Co.*, 242.

Negligence — Injury — Impairment of Prospects of Marriage—Remoteness — Excessive Damages.] — See NEGLIGENCE; STREET RAILWAYS, 2.

Practice — Expropriation — Railway Act, sec. 220—Appeal —Judgment of Court Acting Without Jurisdiction—Res Judicata — Trespass — Costs.] — See EXPROPRIATION, 5.

Crops — Right of Way not Fenced—Fence Ordinance (N. W.T.).] — See ANIMALS AT LARGE, 1, 2, 6.

Carrier of Goods—Lost Luggage — Receipt — Notice — Alteration of Oral Contract.] — See CARRIERS OF GOODS, 1.

Fatal Accidents Act — Death of Wife and Mother — R.S.O. 1897, ch. 166.] — See FATAL ACCIDENTS ACT.

DANGEROUS COMMODITIES.

Jurisdiction of Board — Express Companies — Refusal to Carry — Discretion — Railway Act, secs. 317, 348, to 354.] — See EXPRESS COMPANIES, 1.

DELIVERY.

To Consignee — Carriage of Goods — Seizure by Railway Company for Unpaid Tolls — Railway Act, secs. 3, 4, and 5—

“Seize”—Termination of Carriers’ Lien—Demand—Conversion.]—See TOLLS, 1.

DELIVERY IN TRANSIT.

Tolls—Interswitching Charges—Excessive—Through Rate and Balance Thereof — Stop-over Privilege — Absorption of Interswitching Tolls—Intermediate and Terminal Points—Tariffs to be Filed—Refund.]—See INTERSWITCHING CHARGES, 1.

DELIVERY OF GOODS.

Without Surrender of Bill of Lading—Condition—Claim for Loss — Time — Breach of Contract — Quantity — “More or Less.”]—See CARRIERS OF GOODS, 2.

DEMAND.

By Railway Company—Termination of Carriers’ Lien—Carriage of Goods—Seizure by Railway Company for Unpaid Tolls—Railway Act, secs. 3, 4 and 5—Seize—Conversion.]—See TOLLS, 1.

DEMURRAGE.

See STOP-OVER PRIVILEGES.

DERAILMENT.

Latent Defect in Wheel—Injury to Passengers.]—See CARRIERS OF PASSENGERS, 2.

DESTINATION.

Stop-over Privileges — Retroactive—Through Rate—Demurrage Charge—Stop-over Charge

—Tariff Disallowed.] — See STOP-OVER PRIVILEGES.

DISALLOWING TARIFFS.

Interswitching Charges — Through Freight Traffic — Reduction of Tolls—Fair and Proper—High Grade Ore — High Toll—Less Traffic—Absorption—Variation of Order—Parties Interested.]—See INTERSWITCHING CHARGES, 2.

DISCRETION.

Dangerous Commodities — Jurisdiction of Board—Refusal to Carry — Railway Act, secs. 317, 348 to 354.]—See EXPRESS COMPANIES, 1.

DISCRETION OF RAILWAY COMPANY.

See TOLLS, 6.

DISCRIMINATION.

1. *Unjust Discrimination — Special Mileage Tariff—Division of Through Rate—Local Consumption — Eastern Markets — Competition — Grain Growing Territories—Through Shipments—Local Rate—Reasonableness—Crow’s Nest Pass Agreement.]—On a complaint to the Board that the rate on grain, grain products and vegetables for local consumption from Franklin to Winnipeg was unjustly discriminatory as compared with the rate from the same point to Fort William a much farther distance, on*

the same goods for eastern markets.

Held, (1) That the complaint should be dismissed. The conditions affecting through shipments at through rates are such that a division of through rates cannot be taken as a measure of the reasonableness of a local rate.

(2) The competition of other grain growing territories fixes the rate on through shipments to eastern markets.

(2) The rates are also affected by the Crow's Nest Pass Agreement: See *British Columbia Pacific Coast Cities v. Canadian Pacific R.W. Co.* (*Vancouver Interior Rates Case*), 7 Can. Ry. Cas. 125. *Kerr v. Canadian Pacific Ry. Co.*, 207.

2. *Unjust discrimination—Unreasonable Tolls—Competition—Similar Factories—Costs of Production—“Equality” Clause—Similar Circumstances and Traffic Conditions—Mileage Distance—Water Competition—Differences in Traffic Conditions—Main and Branch Line Mileage—Heavy and light Traffic—Low-grade Tonnage—Compelled Rate—Traffic—Important in Amount—Railway Act, secs. 315, 334.]—*

Upon a complaint under secs. 315 and 334 of the Railway Act by the Cement Company that the through toll of \$1.50 per ton on bituminous coal from Black Rock, N.Y., to Marlbank, Ont., was unjustly discriminatory and unreasonable, because (1) there

should be no difference in the tolls on coal to the applicants competing with similar factories receiving more favourable treatment, (2) on the basis of mileage, (3) as compared with tolls to other points such as Belleville and Kingston. From Black Rock to Napanee, a distance of 237 miles, the coal moved over the Grand Trunk Railway, and thence to Marlbank, a distance of 36 miles, over the Bay of Quinte Railway. Out of the through toll the Grand Trunk received \$1.05, or 70 per cent., and the Bay of Quinte the balance.

Held, (1) That the “equality” clause of section 315 was not intended to equalize the cost of production between similar competing factories, but applies only when such factories were given more favourable treatment under similar circumstances and conditions of traffic.

(2) That a comparison of mileages as if both hauls were on the same railway line was not a proper method of comparison, difference in traffic conditions being in general more important.

(3) That the principle recognized in the *Almonte Knitting Company* case that a higher toll may be charged to points on a branch line than to points on a main line, though at a less distance from the junction point, applies with greater force in favour of a light traffic and low-

grade tonnage railway as compared with a heavy traffic and high-grade tonnage railway.

(4) That the toll to Marlbank cannot be compared with compelled tolls to other points such as Belleville and Kingston, where there is not effective water competition to Marlbank on traffic important in amount.

(5) That, upon the evidence, the toll charged is not unreasonable.

(6) The Grand Trunk having stated its willingness to reduce its division of the through rate to \$1.00 per ton, the Bay of Quinte to participate in such through rate, receiving thirty per cent., the Board approved a rate of \$1.43 per ton.

Almonte Knitting Company v. Canadian Pacific and Michigan Central Ry. Cos., 3 Can. Ry. Cas. 441, followed. *Canadian Portland Cement Co. v. Grand Trunk and Bay of Quinte Ry. Cos.*, 209.

Telegraph Tolls—Filing Tariffs—Press Despatches—Railway Act 314(5), 315.]—See **TOLLS**, 7.

ENTRANCE TO CAR.

Passengers—Entry by Rear of Car — Order of Railway and Municipal Board — Injury to Passenger Attempting to Enter by Front Door.] — See **STREET RAILWAYS**, 1.

EQUAL RATES.

See **TOLLS**, 5.

EQUALITY CLAUSE.

*Discrimination — Unreasonable Tolls — Competition — Similar Factories—Costs of Production—Similar Circumstances and Traffic Conditions—Mileage Distance — Water Competition — Differences in Traffic Conditions — Main and Branch Line Mileage — Heavy and Light Traffic—Low Grade Tonnage—Compelled Rate — Important in Amount — Railway Act, secs. 315, 334.]—See **DISCRIMINATION**, 2.*

EVIDENCE.

*Conflicting — Fire from Locomotive — Damage to Standing Bush—Findings of Jury—Railway Act, sec. 298 — Lands — Plantations — Interpretation of Statutes.]—See **FIRES**, 2.*

*Fatal Accidents Act—Death of Infant by Negligence—Pecuniary Loss to Parent—Reasonable Expectation of Benefit — Damages — Jury — Judge's Charge.]—See **INFANT**, 2.*

*Invalidity—Workmen's Compensation.] — See **MASTER AND SERVANT**, 2.*

Railway Map—Admissibility — Appellate Court — Liability of Railway Companies for Fires — Railway Act, 1888, sec. 134; 1903, secs. 128, 239—Damages by Fire—Ignition of Combustible

Matter on Railway—Right of Way—Negligence.—See FIRES, 1.

Requirement of Plans—Railway Act, secs. 158, 177, 217, 220—Expropriation—Injunction—Undertaking to Comply With the Act—Plan Filed of Land Subsequently Sub-divided—Practice—Appeal—Judgment—Persona Designata—Stated Case—Admission of Counsel.—See EXPROPRIATION, 4.

EXCESS.

Carriage by Water—Bill of Lading—Weights and Measures—Canadian or American—Compulsory Payment—Freight—Contract by Telegram.—See BILL OF LADING.

EXCESSIVE DAMAGES.

Fatal Accidents Act—Death of Wife and Mother—R.S.O. 1897, ch. 166.—See FATAL ACCIDENTS ACT.

EXCESSIVE RATES.

See TARIFF, 1; TOLLS, 4.

EXCESSIVE TOLLS.

See EXPRESS COMPANIES, 2; TOLLS, 5, 6.

EXCLUSIVE CONTRACT.

Jurisdiction of Board—Installation of Telephones in Railway Stations—Public Convenience

—Provincial Companies to be Bound by Contract—Fair and Reasonable Conditions—Railway Act, sec. 245.—See TELEPHONES, 1.

EXPORT TRAFFIC.

Terminal Charges—Absorption—Separate and Joint—Railway and Ocean Bill of Lading—Competition Between Ocean Ports and Carriers—United States—Canada—Inward Cartage—Unreasonableness—Unjust Discrimination—Refunds—Parity in Tolls—Advance in Freight Tolls—Competition of Markets—Increase in Cartage Charges—Increased Cost of Service—Retroactive Order.—See TERMINAL CHARGES.

EXPRESS COMPANIES.

1. *Jurisdiction—Express Companies—Dangerous Commodities—Refusal to Carry—Discretion—Railway Act, secs. 317, 348-354.*—Application to the Board for an order directing the express companies operating in Canada to receive and carry a certain commodity.

The express companies contended that the Board had no jurisdiction to order them to carry any class of commodity and refused to carry the said commodity because it was dangerous and liable to explode.

Held, under the relevant provisions of the Railway Act, secs.

317, 348-354, express companies are at liberty to exercise their own discretion in refusing to carry by express any particular commodity. *Canadian and Dominion Express Cos. v. Commercial Acetylene Co.*, 172.

2. *Jurisdiction—Express Company — Damages — Wrong-billing — Negligence — Company's Agent — Provincial Courts — Excessive Tolls—Refund.*]—On an application to recover damages for the company's alleged negligence in way-billing a skiff to the wrong address, and charging excess tolls for sending it in a roundabout course to its proper destination, it being in dispute who was responsible for the erroneous way-billing.

Held, that the Board had no jurisdiction to entertain the complaint; the complainant must be left to her rights in the Courts.

Held, that the Board could only investigate the error in computing the express tolls of the company, but as the company offers to refund the excess the Board should not interfere. *Rogers v. Canadian Express Co.*, 480.

EXPROPRIATION.

1. *Expropriation by a Railway Company—Ratification of Arbitration Award — Costs — C. P.* 549, 1067, *R.S.Q.*, 5164.]—*Held*,

(1) A petition for the ratification of an arbitration award; upon an expropriation of land by a railway company for the building of its line, is presented in the interest of the railway company solely, the company shall pay the costs of appearance upon the petition, with the costs of the expropriated owner's attorneys on the petition, but not the costs on a reply to the petition.

(2) The costs incurred in the distribution of the monies deposited in Court by the company petitioner shall be taken out of the said monies as in the ordinary course of law. *Chateauguay & Northern R.W. Co. v. Laurier*, 51.

2. *Appointment of a Clerk to the Arbitrators — Appeal from the Award — Petition by the Clerk for Payment of his Fees Out of the Deposit Made in Bank for the Immediate Taking Possession of the Land Pending Expropriation Proceedings — Railway Act, secs. 152, 162, 171.*]—*Held*, (1) The award by the arbitrators does not constitute a judgment for costs and, therefore, the latter cannot be recovered against the losing party by way of execution.

(2) By section 162 of the Railway Act, the Judge in taxing the costs is exercising a function merely ministerial, and such taxation has not the effect of giving to the party in favour of whom

the costs have thus been taxed, a judgment upon which he might proceed to recover his costs.

(3) The only means to recover the costs under the Railway Act, would be by way of an ordinary action, i.e., compare *Ex parte Gagnon*, Q.R. 3 S.C. 288. *Canadian Northern R.W. Co. v. Touchette & Fortier*, 53.

3. *Railways—Renewable Lease — Occupation After Expiration of Term Without Renewal — Tenancy at Will — Compensation — “Persons Interested” in the Land—Right to Renew for Part — Railway Act — R.S.C. 1906, ch. 37, sec. 155.*—Lessees under a renewable lease, or their assignees, where the lessors have an option to renew or to pay for improvements, who remain in possession after expiration of the term, but to whom no renewal lease is granted, although demanded, are in occupation as tenants at will merely, and are not “persons interested” in the land within the meaning of sec. 155 of the Railway Act, R.S.C. 1906, ch. 37, and therefore are not entitled to compensation for expropriation of any part of the lands demised.

Judgment of Riddell, J., reversed. *Canadian Pacific R.W. Co. v. Brown Milling & Elevator Co.*, 56.

4. *The Railway Act, secs. 158, 177, 217, 220—Expropriation of*

Lands—Requirements of Plans, Profiles and Books of Reference — Injunction — Undertaking of Railway Company to Comply with Act—Plan Filed of Land Subsequently Sub-divided — Practice — Appeal — Judgment of Persona Designata—Stated Case—Admissions of Counsel in —Effect of.]—While a substantial compliance only is needed with the provisions of sec. 158 of the Railway Act with respect to plans, profiles and books of reference to be filed prior to expropriation proceedings being taken, it must clearly appear from the plans, profiles and books of reference filed, exactly what portion of the land of each separate owner the railway company requires, and the mere indication of the centre line of the proposed railway is not sufficient; the book of reference is a necessary part of the filings to substantially comply with the provisions; if the first definite information to the owner as to the quantity of land to be taken is obtainable only from the notice served, there has not been substantial compliance with the Act.

In the absence of evidence that the company has been oppressive or high-handed, an injunction will not be granted to restrain the railway company from proceeding with the railway, even if there has not been substantial compliance with the Act,

provided the railway company will enter into an undertaking to comply forthwith with the requirements of the Act and to facilitate the proceedings for determining the amount of compensation to be paid—following *Corporation of Parkdale v. West*, L.R. 12 A.C. 602, 56 L.J. P.C. 66, 57, L.T. 602, and *Hendrie v. Toronto, Hamilton and Buffalo Ry. Co.*, 26 O.R. 607, affirmed 27 O.R. 46.

But the Court will reserve to the plaintiff the right to apply to a single Judge for an injunction to prevent any unnecessary delay in proceeding to comply with the Act and pay compensation.

Warrants of possession improperly granted to a railway company which has not complied with the provisions of the Act will not prevent or render invalid the registration of a plan sub-dividing the lands required by the railway company, but,

Held, that in the absence of acceptance by the municipality of the streets, and evidence of a user of the streets by the public, or of evidence of the sale of lands in the sub-division, the streets shewn on the plan do not become highways.

Quære, per Stuart, J.:—Whether or not the judgment of a Judge who is *persona designata* is appealable in view of the decision in *C.P.R. v. Little Seminary of Ste. Therese*, 16 S.C.R. 606,

since the enactment of sec. 220 of the Railway Act.

Quære per Stuart, J.—Whether or not a dissatisfied litigant who has the right to appeal must appeal and is not at liberty to bring the same matter before the Court in a different way, but,

Held, that where the right of appeal was doubtful and the plaintiff had given notice of appeal, and at the same time brought an action for injunction, in which action the validity of the order appealed from would have to be inquired into, the matter was properly before the Court.

Held, also, that the Court will not be bound by agreements of counsel in a stated case as to the effect upon the rights of parties to the action by determination of certain questions submitted in certain specified ways. *Marsan v. Grand Trunk Pacific R.W. Co.*, 341.

5. *The Railway Act, sec. 220—Practice — Appeal — Right of Appeal — Judgment of a Court Acting Without Jurisdiction — Res Judicata — Trespass—Nominal Damages — Costs.*—The defendant applied for warrant of possession under the Railway Act regarding expropriation of lands, and the Judge, sitting in Court, granted the warrant of possession on facts which the Court *en banc*, in *Marsan v.*

Grand Trunk Pacific, supra, held were not sufficient to give the Judge jurisdiction, and the order was therefore invalid.

The plaintiff, instead of taking an appeal from the order, brought an action against the railway company, claiming injunction and damages.

Held, that the plaintiff could maintain the action, for the reason that, even if an appeal would lie from the order, the plaintiff was entitled to additional relief by way of an injunction and damages which could not be given on appeal.

Held, also, the principle of *res judicata* would not apply, as the order granting the warrant of possession was made without jurisdiction: *Attorney-General for Trinidad v. Enriche*, 63 L.J. P.C. 6, [1893] A.C. 518, 1 R. 440, 69 L.T. 505, referred to.

Held, also, that the railway company having acted under the invalid warrant of possession had committed a technical trespass and was liable for nominal damages, which carried costs.

Marsan v. Grand Trunk Pacific Ry. Co., ante, p. 341, distinguished. *Girouard v. Grand Trunk Pacific R.W. Co.*, 354.

FARM CROSSINGS.

Opening Under Gate at Farm Crossing—Also to Fence—Animals Escaping to Adjoining Farm and Thence on Railway.]
—See ANIMALS AT LARGE, 4.

FATAL ACCIDENTS ACT.

Excessive Damages — Death of Wife and Mother — R.S.O. 1897, ch. 166.]—In an action under the Fatal Accidents Act, R.S.O. 1897, ch. 166, to recover damages for the death of a married woman, 62 years of age, the jury awarded \$3,325, apportioning \$325 to the executors of her husband who survived her, \$800 to a daughter 36 years of age, \$700 to a son 27 years of age, and \$1,500 to a son 21 years of age.

Held, that damages recoverable being entirely pecuniary, the above (except as to the executors), considering the ages and circumstances of the children, and the age and financial ability of the mother, were grossly excessive and the case must go to a new assessment. *Ronson v. Canadian Pacific R.W. Co.*, 361.

Death of Infant by Negligence — Pecuniary Loss to Parent — Reasonable Expectation of Benefit — Damages — Jury — Evidence — Judge's Charge.]—See INFANT, 2.

FENCES.

Fence Ordinance (N.W.T.)—Railway Act, sec. 254—Crops—Damage to.]—See ANIMALS AT LARGE, 1, 2.

Defective Fence — Animal Killed by Falling from Railway

Bridge—Railway Act, sec. 254.]
—See ANIMALS AT LARGE, 3.

Opening in Fences — Also Under Gates at Farm Crossings — Animals Escaping to Adjoining Farm and Thence upon Railway.]—See ANIMALS AT LARGE, 4.

Statutory Obligation as to — Gap Left in—Animals Injured—When “at Large”—Contributory Negligence — Lands Enclosed, Settled, or Improved — Railway Act, sec. 254.] — See ANIMALS AT LARGE, 5, 6.

Lands Enclosed, and Either Settled or Improved—Onus of Proof—Railway Act, sec. 254.] — See ANIMALS AT LARGE, 5.

Jurisdiction of Board—Highway Crossings — Not Legally Closed — Stile — Substitute — Acquiescence by City and Public — Order — Review, Rescind or Vary — Reasonable Convenience of the Public — Conditions as to Safety — Highway to be Kept Open — Railway to Construct — City to Maintain and Make Safe.] — See HIGHWAY CROSSINGS, 1.

FILING TARIFFS.

Telegraph Tolls — Discrimination — Press Despatches — Railway Act, 314(5).] — See TOLLS, 2, 5, and 7.

Tolls—Interswitching Charges — Excessive—Through Rate and Balance Thereof — Stop-over Privilege — Absorption of Interswitching Tolls — Intermediate and Terminal Points — Delivery in Transit — Refund.]— See INTERSWITCHING CHARGES, 1.

FIRES.

1. *Law of Canada — Railway Act, 1888, sec. 134—Railway Act, 1903, secs. 128, 239—Admissibility of Railway Map by the Appellate Court—Damages by Fire—Ignition of Combustible Matter on Railway—Right of Way—Negligence.]—By sec. 239 of the Railway Act (3 Edw. VII. ch. 58), it is provided that the respondent railway company shall at all times keep its right of way free from combustible matter, sub-sec. 2 providing that when damage is caused by a fire started by a railway locomotive the company shall be liable whether guilty of negligence or not, in the latter case the liability being limited to a specified amount.*

Where ignition occurred from the respondents' engine sparks at a rocky bluff shewn by a map filed by them in the Department of Railways and Canals under sec. 134 of the Railway Act of 1888, repeated by sec. 128 of the later Act, to be within the delineated right of way, the respondents were held to be liable for the damages assessed by the jury.

The Supreme Court of Canada, having on the objection of the respondents refused to admit the map in evidence on the ground that it had not been tendered at the trial, ordered a new trial.

Held, that whether or not the Supreme Court was right in refusing to admit the map their lordships would admit it, that it was conclusive in favour of the appellants, and that there had been no misdirection. *Blue v. Red Mountain R.W. Co.*, 140.

2. *Railway — Fire from Locomotive—Damage to “Standing Bush”—Conflicting Evidence—Findings of Jury — Dominion Railway Act, sec. 298—“Lands”—“Plantations” — Interpretation of Statutes.*]—In an action brought under sec. 298 of the Railway Act, R.S.C. 1906, ch. 37, to recover the amount of damage caused to “standing bush” on the plaintiff’s land by a fire, alleged to have been started by a locomotive of the defendants, there was a conflict of evidence as to whether the fire which actually did the damage spread to the plaintiff’s land from a fire started by the defendants’ locomotive, or from a fire started on the land of one H.

Held, that there was evidence to justify the written finding of the jury that the damage to the plaintiff’s property was caused

by fire from the defendants’ locomotive, and that an apparently inconsistent oral response made by the foreman to a question put by the trial Judge was, on the evidence, reconcilable with the written finding.

Held, also, that “standing bush” comes within the provisions of sec. 298, being included in “lands,” notwithstanding the occurrence of “plantations” in the words of the enactment, “crops, lands, fences, plantations, or buildings and their contents.”

In regard to legislation of this kind, the rule is to adopt the construction most beneficial to the public: see sec. 15 of the Interpretation Act, R.S.C. 1906, ch. 1, sec. 15. *Campbell v. Canadian Pacific R.W. Co.*, 300.

3. *Railway Company — Destruction of Property by Spark from Locomotive—Negligence of Defendant—Proximate Cause.*]—Plaintiff was the owner of a warehouse in close proximity to defendant’s railway. Within six feet of the warehouse he piled a quantity of hay, which became ignited by a spark from a locomotive on the railway, and the fire spread to the warehouse, which was totally destroyed. The jury found that the fire originated from the defendants’ engine, but that the plaintiff had been guilty of negligence in storing the hay in such close proximity to the railway.

Held, that 'as the jury had found the plaintiff negligent, and as such negligence was the proximate cause of the damage, he could not recover. *Cairns v. Canadian Northern R.W. Co.*, 306.

4. *Railway — Destruction of "Crops"*—*Sparks from Locomotive*—*Marsh Hay Cut and Baled*—*Railway Act, R.S.C. 1906, ch. 37, sec. 298.*]—*The Railway Act, R.S.C. 1906, ch. 37, sec. 298*, enacts that "whenever damage is caused to crops . . . plantations, or buildings and their contents, by a fire, started by a railway locomotive, the company making use of such locomotive, whether guilty of negligence or not, shall be liable for such damage."

Held, that the plaintiff was not entitled to recover under the above section in respect to marsh hay cut at some distance from the railway and baled and piled on the property of another person along a siding of the defendants, to which place it had been carried while awaiting shipment, and where it had been destroyed by fire caused by sparks from one of the defendants' locomotives.

Judgment of Teetzel, J., and a Divisional Court reversed. *Fraser v. Pere Marquette R.W. Co.*, 308.

FOREIGN CARRIER.

Joint Tariff—*Classification*—*Exception* — *Continuous Route*—*Through Rate*—*Local or Special Commodity Rates*—*Excessive Rates*—*Refund*—*Railway Act, secs. 317, 321 (sub-secs. 2, 3, 4), 323, 333, 334, 336, 338.*]—*See* *TARIFF, 1.*

FOREIGN PORT.

Jurisdiction of Board—*Reasonable Tolls*—*English, Canadian, and Foreign Railways*—*Filing with Board*—*Continuous Route*—*Through Traffic* — *Construction and Operation*—*Control*—*Traffic by Water*—*Railway Act, secs. 2(21), 8(b), 333(3), 335, 336, 8 & 9 Edw. VII. ch. 32, sec. 11.*]—*See* *TARIFF, 2.*

FOREIGN RAILWAY.

Provincial Railway—*Jurisdiction of Board*—*Work for General Advantage of Canada*—*Operation in Canada*—*Through Traffic* — *Station Facilities* — *Railway Act, secs. 2(21), 8(b).*]—*See* *JURISDICTION OF BOARD, 3; TARIFF, 2.*

FRANCHISE.

Allowance for Value of—*Arbitration*—*Street Railway Act, sec. 41.*]—*See* *STREET RAILWAYS, 4.*

GATE.

Opening Under—*Gap in Fence*—*Farm Crossings*—*Escape of*

Animals from Adjoining Farm.] — See ANIMALS AT LARGE, 4.

Siding—Agreement for Use of —Protection of Railway from Animals.] — See ANIMALS AT LARGE, 7.

Highway Crossings — Grade Crossing Fund — Contribution by Municipality—Railway Act, sec. 238, 239(a).]—See HIGHWAY CROSSINGS, 4.

GRADE CROSSING FUND.

See HIGHWAY CROSSINGS, 4.

GENERAL ADVANTAGE OF CANADA.

Work for—Provincial Railway —Jurisdiction of Board—Foreign Railway — Operation in Canada—Through Traffic—Station Facilities—Railway Act, secs. 2(21), 8(b).]—See JURISDICTION OF BOARD, 3.

HAY.

Marsh Cut and Baled—Deconstruction of Crops—Sparks from Locomotive—Railway Act, sec. 298.]—See FIRES, 4.

HIGH TENSION WIRES.

Jurisdiction of Board—Telephone Wires—Leave to Cross—Protective Measures—Public Interest—Federal and Provincial Companies—Railway Act, sec.

246, 7 & 8 *Edw. VII. ch. 61, secs. 1 and 5.*] — See TELEPHONES, 2.

HIGHWAY CROSSINGS.

1. *Jurisdiction—Public Highway—Crossing—Fenced — Not Legally Closed—Stile Substituted — Acquiescence by City and Public—Order of the Board —Review, Rescind or Vary — Reasonable Convenience of the Public—Conditions as to Safety —Highway to be Kept Open— Railway to Construct—City to Maintain and Make Safe.*]—On an application to review, rescind or vary a former order of the Board approving the closing of a public highway across the right of way of a railway company and the substitution of a stile therefor.

Held, (1) That conditions have greatly changed since the date of the former order, the reasonable convenience of the public requires the highway to be open, which had never been legally closed.

Held, (2) That the application for the re-opening of the highway should be granted on condition that the railway company construct crossing, the city maintain the same and make such changes in the locality as will render the crossing as safe as may be under the circumstances. *City of Victoria v. Esquimalt & Nanaimo Ry. Co.*, 470.

2. *Jurisdiction — Foot-bridge Over Railway—Railway Act — Sec. 237 (8-9 Edw. VII. ch. 32, sec. 4).*]—The city of Vancouver applied for an order permitting it to construct at its own expense a wooden foot-bridge across the tracks of the Canadian Pacific Ry. Co. at the north end of Carrell Street, where a street ends at the south boundary of the railway right of way; the foot-bridge being in continuation northerly of the street and leading to wharves, the property of the railway company, on the water front of Vancouver Harbour. The nearest highway crossing of the railway was several hundred feet distant from the site of the proposed foot-bridge.

The company contended that the Board had no jurisdiction to grant the application, its power being limited to order the erection of a foot-bridge at an existing highway crossing under section 239.

Held, that under section 237 (section 4 of 8-9 Edw. VII. ch. 32) the Board had jurisdiction to grant the application.

Held, that the foot-bridge so erected shall be a highway across the railway. *City of Vancouver v. Canadian Pacific Ry. Co.*, 478.

3. *Highways Across Railway — Railway to Open and Bear Expense — Road Allowances — Reservation by Crown.*] — On

application by a municipality for a highway crossing over the line of the Canadian Pacific Railway Company at the expense of the railway company on the town line between two townships where no road allowances had been reserved in the original survey, but under this system of survey, when patents issue, a reservation of five per cent. is made for roads, with the right in the Crown to lay out same, where necessary or expedient.

Held, in view of such reservation by the Crown, that the railway company should be required to bear the expense of opening the highway across its right of way. *Township of Caldwell v. Canadian Pacific Ry. Co.*, 497.

4. *Highway Crossings—Gates —Grade Crossing Fund—Contribution by Municipality—Railway Act, secs. 238 and 239(a).*] —Application by the municipality for an order requiring the company to place gates at a highway crossing already protected by an electric bell. It was shewn that this crossing was particularly dangerous owing to obstructions to the view, the heavy traffic both on highway and railway, and the bell being constantly out of repair.

Held, that the company should install and maintain gates at this crossing.

Held, that twenty per centum of the cost of installation should

be payable from "The Railway Grade Crossing Fund."

Held, that ten per centum of the cost of operation be borne by the municipality. *Township of Walpole v. The Grand Trunk Ry. Co.*, 499.

HUSBAND AND WIFE.

Carriers of Passengers — Action of Tort—Personal Injuries to Wife—Joinder of Parties and of Causes of Action—Action of Husband for Loss of Wife's Services—Common Law Procedure Act, 1852, sec. 40—English Order 18, Rule 4 — Negligence—Combination of Circumstances Constituting Negligence—Access of Passengers to Cars — Length, Lighting and Protection of Platform—Nature and Measure of Damages.]—See CARRIERS OF PASSENGERS, 1.

IGNORANCE OF LAW.

See MASTER AND SERVANT, 1.

INFANT.

1. *Operation of Tramway — Negligence—Injury to Infant—Reckless Running of Car.*] — *Sydney and Glace Bay R.W. Co. v. Lott*, 359.

2. *Fatal Accidents Act — Death of Young Child Caused by Negligence—Pecuniary Loss of Parent—Reasonable Expectation of Benefit—Damages—Jury*

—Evidence—Judge's Charge.]

—A verdict of a jury for \$300 damages for the death of the plaintiff's child, aged four years, in an action under the Fatal Accidents Act, was upheld by a Divisional Court and by the Court of Appeal (Moss, C.J.O., and Maclaren, J.A., dissenting), where it appeared that the child was healthy, intelligent, and with as good a prospect of prolonged life as any infant of that age could be said to have. The question is for the jury, upon the evidence; pecuniary benefit or advantage need not have been actually derived by the parent previous to the death; the probability of the continuance of life and the reasonable expectation that in that event pecuniary benefit or advantage would have been derived are proper subjects for consideration.

Pym v. Great Northern R.W. Co. (1862), 2 B. & S. 759, and *Blackley v. Toronto R.W. Co.* (1897), 27 A.R. 44n., applied and followed.

The trial Judge's direction to the jury upon the questions of damages and the findings of the jury upon the question of negligence were also considered and upheld by the Divisional Court. *McKeown v. Toronto R.W. Co.*, 449.

Animals at Large—Railway—Competent Person—Judgment—Railway Act, sec. 294.]— See

ANIMALS AT LARGE, 8; STREET RAILWAYS, 3.

INJUNCTION.

Requirement of Plans—Railway Act, secs. 158, 177, 217, 220—Expropriation—Undertaking—Plan Filed of Land Subsequently Sub-divided—Practice—Appeal—Judgment—Persona Designata—Stated Case—Admission of Counsel.]—See EXPROPRIATION, 4.

INJURY TO SERVANT.

Workmen's Compensation Act—Notice—Reasonable Excuse for Failure to Give—Administrator—Notice Before Issue of Letters—Ignorance of Law—Workmen Injured in Railway Yard—Finding of Jury—Licensee—Statutory Duty—Defective System—New Trial—Ground not Alleged in Pleading.]—See MASTER AND SERVANT, 1.

INTEREST.

Rate of—Arbitration—Compensation for Lands Taken—Jurisdiction of Arbitrators—Possession Under Warrant of Possession—Payment of Money into Court—Payment Out.]—See ARBITRATION.

INTERMEDIATE POINT.

Excessive Tolls—Normal Rates—Discretion of Railway Company—Shorter and Longer Dis-

tances—Traffic—Important in Amount.]—See TOLLS, 6.

Competition—Joint Tariff—Continuous Route—Basing Point—Collection of Tolls—Railway Act, secs. 314(5), 315(5), 335.]—See TARIFF, 3.

INTERMEDIATE AND TERMINAL POINTS.

Tolls—Interswitching Charges—Excessive—Through Rate and Balance Thereof—Stop-over Privilege—Absorption of Interswitching Tolls—Tariffs to be Filed—Delivery in Transit—Refund.]—See INTERSWITCHING CHARGES, 1.

INTERSWITCHING CHARGES.

1. *Interswitching Charges—Excessive—Through Rate and Balance Thereof—Stop-over Privilege—Absorption of Interswitching Tolls—Intermediate and Terminal Points—Tolls, Reasonable or Otherwise—Tariffs to be Filed—Delivery in Transit—Refund.*]—Upon a complaint to the Board that excessive interswitching charges were made by the Canadian Pacific Ry. Co. for the transfer of cars from the line of the Canadian Northern Ry. Co. to the elevators of the complainants.

The complaints arose with reference to traffic originating upon the lines of the Canadian Northern to be carried by them at a through rate to Fort Wil-

liam or Port Arthur when delivered in transit to the elevators of the complainants upon the stop-over privilege of 1 cent per 100 pounds.

Held, (1) That the interswitching order of July 8th, 1908, did not apply, that the charge of \$5.00 per car made by the Canadian Pacific for interswitching was reasonable, and tariffs should be filed accordingly.

(2) That the Canadian Northern could not be called upon to absorb any of this charge, the provisions of the interswitching order of July 8th, 1908, only applying to terminal and not to intermediate points.

(3) That refunds in excess of the charge of \$5.00 already paid could not be directed, the railway companies charging the tolls called for in their tariff.

Canadian Manufacturers' Association v. Canadian Freight Association (Joint Switching Rates Case), 7 Can. Ry. Cas. 302, distinguished. *Anchor Elevator & Warehousing and Northern Elevator Cos. v. Canadian Northern and Canadian Pacific Ry. Cos.*, 175.

2. Disallowing and Fixing Tariffs—Interswitching Charges—Through Freight Traffic—Reduction of Tolls—Fair and Proper—Higher Grade Ore—Higher Toll—Less Traffic—Absorption—Variation of Order—Parties Interested.—The Red Moun-

tain Ry. Co. applied to the Board for a variation of its order fixing the tolls to be paid them for interswitching services performed on through traffic of ore from the Le Roi Mines to the "transfer track" of the Columbia and Western Ry. Co.

The Board had on the application of the Columbia and Western fixed at \$3.50 and subsequently reduced to \$3.00, per carload, the tolls for interswitching paid to the Red Mountain.

The variation to raise the tolls was sought on the ground that higher grade ore should pay a higher toll and a less movement of cars was not so profitable as a larger.

Held, (1) That the application should be refused, the conditions not having changed nor the car movement considered when the order was made.

(2) That the order must be held to have been properly made and the tolls to be fair and proper until the contrary was conclusively shewn.

(3) *Held*, further that the application could not be entertained because the proprietors of the Le Roi Mines who were interested parties, had not been notified.

(4) That the Columbia and Western should absorb any increase in the tolls charged for interswitching.

(5) That the general interswitching order of 8th July,

1908, *Canadian Manufacturers' Association v. Canadian Freight Association (Joint Switching Rates Case)*, 7 Can. Ry. Cas. 302, does not cover the present case. *Red Mountain Ry. Co. v. Columbia & Western Ry. Co.*, 224.

JUDGE'S CHARGE.

Fatal Accidents Act — Death of Infant by Negligence — Pecuniary Loss to Parent—Reasonable Expectation of Benefit—Damages — Jury — Evidence.] — See INFANT, 1.

Excessive Damages—Permanent Disability — Quantum — Re-imbursing Amount.] — See DAMAGES.

JURISDICTION.

Of Arbitrators — Compensation for Lands Taken by Railway Under Warrant of Possession—Payment of Money into Court—Payment Out — Interest.] — See ARBITRATION.

JURISDICTION OF BOARD.

1. *Board of Railway Commissioners—Jurisdiction — Railway Crossing—Contribution to Cost —Party Interested—Municipality—Distance from Work.*] — A municipality may be a "party interested" in works for the protection of a railway crossing over a highway though such works are neither within or immediately adjoining its bounds and the

Board of Railway Commissioners has jurisdiction to order it to pay a portion of the cost of such work.

Present:—Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. *County of Carleton v. City of Ottawa*, 154.

2. *Jurisdiction—Order — Review, Rescind, Change, Alter or Vary —Approval — Location — Registration—Plan, Profile and Book of Reference—Compensation—Present Value — Charter of Railway Company—Railway Act, secs. 26, 30 and 158—Railway Act, Amendment, 7 & 8 Edw. VII. ch. 62, sec. 29.*] — Application to the Board for an order under sections 26, 30 and 158 of the Railway Act, declaring the plan, profile and book of reference affecting certain lots deposited in the Registry Office by the railway company, not to be in accordance with the provisions of the Railway Act.

The plan had been registered with respect to a portion of the property in question, but no steps had been taken for several years to negotiate with the owners and fix the price to be paid by the railway company.

Held, (1) That an order should be made cancelling the location shewn by such plan, etc., through the lots in question.

(2) That the Board has jurisdiction under section 29 of the amendment to the Railway Act,

7 & 8 Edw. VII. ch. 62, to review, rescind, change, alter or vary any order made by it.

(3) That the charter of the company does not authorize it to register plans upon the lands of private persons and then take no steps to acquire title to such lands during the life of the charter.

(4) If the company is willing to expropriate the lands in question upon the basis of the present value of such lands, no order need issue.

(5) Leave to appeal should be obtained from a Judge of the Supreme Court as the question is one of jurisdiction. *McDougall and Secord v. Canadian Pacific Ry. Co.*, 201.

3. *Jurisdiction of the Board—Provincial Railway—Work “for the General Advantage of Canada”—Foreign Railway—Operation in Canada—Through Traffic—Station Facilities—Railway Act, secs. 2(21), 8(b).*—An application was made to the Board for an order directing the Great Northern Ry. Co. to construct a platform and station building.

The New Westminster Southern, a provincial railway, incorporated by an Act of the Legislature of British Columbia, had not been declared a work “for the general advantage of Canada.”

The trains of the Great Northern, a foreign railway, used the

line of the New Westminster Southern as a connecting line between its line in the State of Washington and Vancouver in British Columbia. The latter company was not shewn to have any rolling stock or equipment, or so far as operation was concerned to be in any way a separate organization from the former.

Held, (1) That the Great Northern, a foreign railway, is subject to the jurisdiction of the Board in so far as it operates in Canada.

(2) That the New Westminster Southern, a provincial railway, although not declared to be a work “for the general advantage of Canada,” but connecting with a railway subject to the jurisdiction of the Board, is, by section 8(b) as regards through traffic upon it, and all matters appertaining thereto, subject to the Railway Act.

(3) That station facilities are matters appertaining to through traffic.

(4) That proper facilities should be provided for the safety and convenience of the public using the trains of the Great Northern Railway.

(5) If the Great Northern desires to apply for leave to appeal upon the question of jurisdiction, the issue of the order may be delayed for 30 days but, if not, the size and location of the station and platform may be defined by an engineer of the

Board. *Thrift v. New Westminster Southern & Great Northern Ry. Cos.*, 205.

Highway Crossings—Fences—Not Legally Closed—Stile—Substitute—Acquiescence by City and Public—Order—Review, Rescind or Vary—Reasonable Convenience of the Public—Conditions as to Safety—Highway to be kept Open—Railway to Construct—City to Maintain and Make Safe.]—See HIGHWAY CROSSINGS, 1.

Foot-bridge Over Railway—Railway Act, sec. 237 (8 & 9 Edw. VII. ch. 32, sec. 4).—See HIGHWAY CROSSINGS, 2.

Installation of Telephones in Railway Stations—Public Convenience—Exclusive Contract—Provincial Companies to be Bound by Contract—Fair and Reasonable Conditions—Railway Act, sec. 245.]—See TELEPHONES, 1.

Telephone Wires—High Tension Wires—Leave to Cross—Protective Measures—Public Interest—Federal and Provincial Companies—Railway Act, sec. 246; 7 & 8 Edw. VII. ch. 61, secs. 1 & 5.]—See TELEPHONES, 2.

Joint Tariff—Reasonable Tolls—English, Canadian and Foreign Railways—Filing with

Board—Continuous Route—Through Traffic—Construction and Operation—Control—Traffic by Water—Foreign Port—Railway Act, secs. 2(21), 8(b), 333(3), 335, 336; 8 & 9 Edw. VII. ch. 32, sec. 11.]—See TARIFF, 2.

Express Company—Damages—Wrong Billing—Negligence—Company's Agent—Excessive Tolls—Refund.]—See EXPRESS COMPANIES, 2.

Tariff—Increase in Tolls—Refund.]—See TOLLS, 8.

JURISDICTION OF COURT.

Practice—Expropriation—Railway Act, sec. 220—Judgment of Court Acting Without—Res Judicata—Trespass—Nominal Damages—Costs.]—See EXPROPRIATION, 5.

JURY.

Fire from Locomotive—Damage to Standing Bush—Conflicting Evidence—Railway Act, sec. 298—Lands—Plantations—Interpretation of Statutes—Findings.]—See FIRES, 2; MASTER AND SERVANT, 1.

LANDS.

Enclosed and Either Settled or Improved—Onus of Proof—Railway Act, sec. 254.]—See ANIMALS AT LARGE, 5.

Fire from Locomotive — Damage to Standing Bush—Conflicting Evidence—Findings of Jury—Railway Act, sec. 298—Interpretation of Statutes.] — See FIRES, 2.

LATENT DEFECT.

In Wheel of Car—Carriage of Passengers — Derailment—Negligence—Liability.] — See CARRIERS OF PASSENGERS, 2.

LEASE.

Expropriation — Compensation — Persons Interested — Occupation after Expiration of Term Without Renewal — Tenancy at Will—Right to Renew for Part—Railway Act, sec. 155.]—See EXPROPRIATION, 3.

LIABILITY.

Condition Limiting — Lost Luggage — Receipt — Notice—Alteration of Oral Contract.] — See CARRIERS OF GOODS, 1.

Of Railway Companies for Fires—Railway Act, 1888, sec. 134; 1903, secs. 128, 239—Admissibility of Railway Map by the Appellate Court — Damages by Fire—Ignition of Combustible Matter on Railway—Right of Way — Negligence.] — See FIRES, 1.

Latent Defect in Wheel of Car — Derailment — Injury to Passenger.]—See CARRIERS OF PASSENGERS, 2.

LIEN.

Termination of Carriers — By Railway Company — Carriage of Goods—Seizure by Railway Company for Unpaid Tolls — Railway Act, secs. 3, 4 and 5 — Seize — Demand — Conversion.]—See TOLLS, 1.

LOCAL RATE.

See DISCRIMINATION, 1; TARIFF, 1.

LOCATION.

Order of Board—Review, Rescind, Change, Alter or Vary—Jurisdiction — Approval—Registration — Plan — Profile — Book of Reference—Compensation—Present Value—Charter of Railway Company—Railway Act, secs. 26, 30, 158; 7 & 8 Edw. VII. ch. 62, sec. 29.] — See JURISDICTION OF BOARD, 2.

LOCOMOTIVE.

Fire from—Damage to Standing Bush—Conflicting Evidence — Findings of Jury—Railway Act, sec. 298—Lands—Plantations — Interpretation of Statutes.]—See FIRES, 2.

Sparks from—Destruction of Crops — Marsh Hay Cut and Baled—Railway Act, sec. 298.] — See FIRES, 4.

Destruction of Property by Sparks from—Negligence of Defendant—Proximate Cause.] — See FIRES, 3.

Fall of Lump of Coal from — Workmen's Compensation—Res Ipsa Loquitur—Release — Evidence — Invalidity.] — See MASTER AND SERVANT, 1.

LONGER AND SHORTER DISTANCES.

Excessive Tolls — Normal Rates — Discretion of Railway Company—Intermediate Point — Traffic — Important in Amount.]—See TOLLS, 6.

LOSS OF SERVICES.

Action of Husband for Loss of Wife's.]—See CARRIERS OF PASSENGERS, 1.

LUGGAGE.

Lost—Contract of Carriage—Receipt — Condition Limiting Liability — Notice—Agents of Owner—Alteration of Oral Contract—Negligence — Damages.] —See CARRIERS OF GOODS, 1.

MASTER AND SERVANT.

1. Injury to and Death of Servant — Workmen's Compensation for Injuries Act — Notice Prescribed by sec. 9—Reasonable Excuse for Failure to Give—Administrator — Right to Give Notice Before Issue of Letters — Ignorance of Law — Negligence — Workman Run Over by Train in Railway Yard — Findings of Jury — Licensee — Statutory Duty — Defective System — New Trial — Ground not Al-

leged in Pleading.]—Section 9 of the Workmen's Compensation for Injuries Act which requires notice of the injury to be given, provides that the notice must be given within twelve weeks after the occurrence of the accident causing the injury, and that in the case of death the want of notice shall not bar the action which the Act gives, if the Judge is of opinion that there was "reasonable excuse" for the want of notice.

Held, that ignorance of the law is not a "reasonable excuse;" and in this case the plaintiff, the brother of the deceased person who was injured, might have given the notice before he was appointed administrator, and his solicitor's mistaken idea to the contrary did not excuse the want of the notice; and the action therefore failed.

Judgment of a Divisional Court reversed.

The deceased was employed by the defendants as a workman on the tracks in a railway yard, and, when crossing the tracks with other workmen on his way home from work, was struck by an engine and killed. The negligence alleged was that the engineer in charge of another engine in the yard let off a large quantity of steam, which prevented the deceased from seeing or hearing the engine which struck him. The jury found that the defendants

were guilty of negligence by blowing off steam or hot water at such a critical moment with such a large number of employees between the tracks; that the deceased came to his death by reason of the negligence of a person in charge of an engine of the defendants, such negligence consisting in blowing off steam or hot water, and that a proper look-out was not kept in a proper place on both engines when backing; and that there was no contributory negligence. On these findings the trial Judge entered judgment for the plaintiff.

Held, by the Divisional Court, that the position of the deceased, in view of clause 5 of sec. 3 of the Workmen's Compensation for Injuries Act, was in the absence of any finding to the contrary, that of a mere licensee; that he could not claim the benefit of sec. 276 of the Dominion Railway Act, because the engine was not passing over or along a highway at rail level; but that the deceased might have had cause to complain of a defective system, within the meaning of clause 1 of sec. 3, from the facts developed in the evidence, although not specifically mentioned in the pleadings; and a new trial was ordered with leave to amend.

The Court of Appeal, reversing the judgment upon the other ground, did not, as a Court, ex-

press an opinion upon these points.

But, *semble*, per Osler, J.A., referring to *Willetts v. Watt & Co.* (1892), 2 Q.B. 92, that the discretion of the Court below in allowing the plaintiff to make a new case, after the time had elapsed within which a new action could be brought, should not, on that ground, be interfered with.

Semble, per Garrow, J.A., that the true position of the deceased at the time of the accident was not that of a mere licensee, but of a person upon the defendant's premises by their invitation, and one to whom the defendants owed a duty to take reasonable care that he should not be injured.

And, *semble*, per Meredith, J.A., that there was no proof of any negligence on the part of the defendants; and the granting of a new trial in order to enable the plaintiff to set up an entirely new case was contrary to proper practice. *Giovinazzo v. Canadian Pacific R.W. Co.*, 423.

2. *Injury to Servant—Negligence—Railway—Fall of Lump of Coal from Locomotive Tender—Workmen's Compensation for Injuries Act, sec. 3, sub-sec. 5—Res Ipsa Loquitur—Release—Evidence—Invalidity.*—The plaintiff was in the employment of the defendants, and, while at work upon a railway track, was

struck by a lump of coal which fell from the tender of a passing locomotive, and injured. It appeared from the evidence, in an action for damages for the injury sustained, that the coal was unnecessarily piled in the tender above the sides in such quantity and manner that the rapid motion of the train shook down the lump, which, falling upon the corner, flew off with dangerous force and struck the plaintiff.

Held, that the unexplained fall of the coal, in the circumstances stated, was in itself evidence from which an inference might well be drawn that those in charge or control of the locomotive (Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, sec. 3, sub-sec. 5) were negligent in their mode of using it by piling or permitting coal to be piled upon the tender so high and without protection that chunks of it could be hurled by the necessary motion of the train with such force as to break a man's leg 15 or 20 feet away; and a verdict for the plaintiff for \$1,500 under the Workmen's Compensation for Injuries Act, was upheld.

Doctrine of *res ipsa loquitur* explained and applied.

The defendants set up as a bar to the action a release signed by the plaintiff, after action, in consideration of \$300 paid to him by the defendants. The

plaintiff was without independent advice, and stated that he believed from what was said that what he was releasing, and all he intended to release, was a claim to wages during his compulsory idleness, all parties, including the doctor, being under the impression that at the end of the period for which he was being paid he would be well and back at work.

Held, that, as the plaintiff's statement was believed by the trial Judge, a finding against the validity of the release should not be disturbed.

Judgment of Clute, J., affirmed. *O'Brien v. Michigan Central R.W. Co.*, 442.

MILEAGE TARIFF.

Special — Unjust Discrimination — Division of Freight Rates — Local Consumption — Eastern Markets — Competition — Through Shipments — Local Rate.—See DISCRIMINATION, 1.

MUNICIPALITY.

Railway Crossing — Jurisdiction of Board — Contribution of Cost — Party Interested — Distance from Work.—See JURISDICTION OF BOARD, 1.

Assumption of Ownership by — Street Railway — Award of Arbitrators — Principle of Valuation — Allowance for Value of Franchise — Allowance for Com-

pulsory Taking—Street Railway Act. sec. 41.]—See STREET RAILWAYS, 4.

NEGLIGENCE.

Damages — Injury — Impairment of Prospects of Marriage—Remoteness — Excessive Damages.]—In an action for negligence, impairment of the prospects of matrimony, in the case of a young woman, by reason of physical injuries, may be taken into consideration by the jury in estimating the damages.

In such a case of accident to a young woman of about 21 years of age, living with her father, but earning \$6 a week as a stenographer, which accident resulted in the amputation of her left leg at the knee, paresis in a hand and arm, of which there might never be complete recovery, injury to the back, and a very serious shock to her nervous system.

Held, that a verdict of \$5,500 damages was not so excessive as to necessitate a new trial. *Morin v. Ottawa Electric R.W. Co.*, 113.

Agreement for Use of Siding — Protection of Railway From Animals — Gate Left Open — Escape and Destruction of Animal.]—See ANIMALS AT LARGE, 7.

Carrier of Goods—Lost Luggage Receipt — Notice.]—See

CARRIERS OF GOODS, 1; CONTRIBUTORY NEGLIGENCE; ANIMALS AT LARGE, 5.

Fatal Accidents Act—Death of Infant by Negligence—Pecuniary Loss to Parent—Reasonable Expectation of Benefit — Damages — Jury — Evidence — Judge's Charge.]—See INFANT, 2.

Operation of Tramway — Injury to Infant — Regulations — Running of Car.]—See INFANT, 1.

Destruction of Property by Sparks from Locomotive — Negligence of Defendant — Proximate Cause.]—See FIRES, 3.

Liability of Railway Companies for Fires — Railway Act, 1888, sec. 134; 1903, secs. 128, 239 — Admissibility of Railway Map by the Appellate Court — Damages by Fire — Ignition of Combustible Matter on Railway — Right of Way.]—See FIRES, 1.

Crops — Damage to — Absence of Fence — Fence Ordinance (N.W.T.).]—See ANIMALS AT LARGE, 1, 2, 6.

See CARRIERS OF PASSENGERS, 1, 2; MASTER AND SERVANT, 1, 2—STREET RAILWAYS, 1, 2.

NEW TRIAL.

Ground Not Alleged in Pleadings.]—See MASTER AND SERVANT, 1.

Misdirection — Questions for Jury—Verdict on Issues—Damages.]—See **STREET RAILWAYS**, 2, 3.

NOT GUILTY BY STATUTE.

Fence Ordinance (N.W.T.) — History and Effect of Pleas "Not Guilty" and "Not Guilty by Statute"—Necessity of Noting in Margin Statutes Relied on—Construction of Statutes.]—See **ANIMALS AT LARGE**, 2.

NOTICE.

Workmen's Compensation — Failure to Give—Administrator—Right to Give Notice Before Issue of Letters.]—See **MASTER AND SERVANT**, 1.

Contract of Carriage—Receipt — Lost Luggage — Agents of Owners — Alteration of Oral Contract.] — See **CARRIERS OF GOODS**, 1.

OCCUPATION OF LAND.

After Expiration of Term Without Renewal — Expropriation — Compensation — Persons Interested — Renewable Lease — Tenancy at Will — Right to Renew for Part—Railway Act, sec. 155.]—See **EXPROPRIATION**, 3.

OPERATION IN CANADA.

Provincial Railway — Jurisdiction of Board — Work for

General Advantage of Canada—Foreign Railway — Through Traffic — Station Facilities — Railway Act, secs. 2(21), 8(b).]—See **JURISDICTION OF BOARD**, 3.

ORDER OF BOARD.

Review, Rescind, Change, Alter or Vary—Jurisdiction—Approval — Location — Registration — Plan — Profile — Book of Reference — Compensation—Present Value—Charter of Railway Company — Railway Act, secs. 26, 30, 158; 7 & 8 Edw. VII. ch. 62, sec. 29.]—See **JURISDICTION OF BOARD**, 2; **HIGHWAY CROSSINGS**, 1.

ORDER.

Railway and Municipal Board — Terms of—Notice of—Necessity for.]—See **STREET RAILWAYS**, 1.

Variation of — Disallowing Tariffs—Interswitching Charges — Through Rate Traffic—Reduction of Tolls—Fair and Proper — High Grade Ore—High Toll — Less Traffic — Absorption — Parties Interested.]—See **INTER-SWITCHING CHARGES**, 2.

PARENT.

Pecuniary Loss to — Fatal Accidents Act—Death of Infant by Negligence—Reasonable Expectation of Benefit — Damages — Jury — Evidence — Judge's Charge.]—See **INFANT**, 2.

PARTIES.

Joinder of.]—See CARRIERS OF PASSENGERS, 1.

PARTY INTERESTED.

Railway Crossing — Jurisdiction of Board—Contribution of Cost — Municipality — Distance from Work.]—See JURISDICTION OF BOARD, 1.

Disallowing Tariffs — Inter-switching Charges — Through Freight Traffic — Reduction — of Tolls — Fair and Proper — High Grade Ore — High Toll — Less Traffic—Absorption—Variation of Order.] — See INTER-SWITCHING CHARGES, 2.

PASSENGER FACILITIES.

Class Rate — Passenger and Special Freight—Excessive Tolls — Filed — Similar Distances — Same Commodities — Another Railway Company — Similar Business—Express Tariff to be Filed — Deficient Car Service — May Renew Complaints — Insufficient Information for the Board—Railway Act, secs. 2(a), 350.]—See TOLLS, 5.

PASSENGER FARES.

Excessive Tolls — Standard Passenger and Special Freight Tariffs — Filed — Similar Distances — Same Commodities — Special Class Rate Tariff — Another Railway Company —

Similar Business — Express Tariff to be Filed — Deficient Car Service — Passenger Facilities — May Renew Complaints—Insufficient Information for the Board — Railway Act, secs. 2 (a), 350.]—See TOLLS, 5.

PAYMENT OF MONEY INTO COURT.

Arbitration — Lands Taken under Warrant of Possession — Jurisdiction of Arbitrators — Payment Out — Interest.]—See ARBITRATION.

PECUNIARY LOSS.

Excessive Damages—Personal Injuries—Permanent Disability — Quantum — Judge's Charge — Counsel's Address to Jury—Mentioning Sum Claimed.]—See DAMAGES.

To Parent — Fatal Accidents Act — Death of Infant by Negligence — Reasonable Expectation of Benefit — Damages — Jury — Evidence — Judge's Charge.]—See INFANT, 1.

PERSONA DESIGNATA.

Requirement of Plans—Railway Act, secs. 158, 177, 217, 220 —Expropriation — Injunction —Undertaking to Comply With Act—Plan Filed of Land Subsequently Sub-divided—Practice — Appeal — Judgment—Stated Case—Admission of Counsel.]—See EXPROPRIATION, 4.

PERSONAL INJURIES.

Excessive Damages — Pecuniary Loss — Quantum—Judge's Charge—Address of Counsel to Jury — Mentioning Sum Claimed.—See DAMAGES.

PERSONS INTERESTED.

Expropriation Compensation —Renewable Lease—Occupation After Expiration of Term Without Renewal—Tenancy at Will — Right to Renew for Part — Railway Act, sec. 155.—See EXPROPRIATION, 3.

PLAN.

Registration — Review, Rescind, Change, Alter or Vary.—See JURISDICTION OF BOARD, 2.

Railway Act, secs. 158, 177, 217, 220 — Expropriation — Injunction — Undertaking—Plan Filed of Land Subsequently Sub-divided — Practice — Appeal — Judgment — Persona Designata — Stated Case — Admission of Counsel.—See EXPROPRIATION, 4.

PLATFORM.

Length, Lighting and Protection of.—See CARRIERS OF PASSENGERS, 1.

PLEADINGS.

Ground Not Alleged in—New Trial.—See MASTER AND SERVANT, 1.

“Not Guilty” and “Not Guilty by Statute” —Necessity of Noting Statutes in Margin of Defence—“Fence Ordinance.”—See ANIMALS AT LARGE, 2.

POSSESSION.

Lands Taken Under Warrant of Possession — Arbitration — Jurisdiction of Arbitrators — Payment of Money into Court—Interest.—See ARBITRATION.

PRACTICE.

Requirement of Plans — Railway Act, secs. 158, 177, 217, 220 — Expropriation — Undertaking to Comply With Act—Plan Filed of Land Subsequently Sub-divided — Appeal — Judgment — Persona Designata — Stated Case — Admission of Counsel.—See EXPROPRIATION, 4.

Expropriation—Railway Act, sec. 220—Appeal—Judgment of Court Acting Without Jurisdiction — Res Judicata — Trespass — Nominal Damages — Costs.—See EXPROPRIATION, 5.

PRESS DESPATCHES.

Telegraph Tolls — Filing Tariffs—Railway Act, 314(5), 315.—See TOLLS, 7.

PRESS AND PRIVATE MESSAGES.

See TOLLS, 4.

PROTECTION OF RAILWAY FROM ANIMALS.

Agreement for Use of Siding — *Gate Left Open* — *Negligence* — *Escape and Destruction of Animal* — *Implication by Terms in Contract.*] — See ANIMALS AT LARGE, 7.

PROTECTIVE MEASURES.

Jurisdiction of Board — *Telephone Wires* — *High Tension Wires* — *Leave to Cross* — *Public Interest* — *Federal and Provincial Companies* — *Railway Act*, sec. 246, 7 & 8 *Edw. VII.* ch. 61, secs. 1 and 5.] — See TELEPHONES, 2.

PROVINCIAL COURTS.

See EXPRESS COMPANIES, 2.

PROVINCIAL RAILWAY.

Jurisdiction of Board — *Work for General Advantage of Canada* — *Foreign Railway* — *Operation in Canada* — *Through Traffic* — *Station Facilities* — *Railway Act*, secs. 2(21), 8(b).] — See JURISDICTION OF BOARD, 3.

PROXIMATE CAUSE.

Destruction of Property by Sparks from Locomotive — *Negligence of Defendant.*] — See FIRES, 3.

PUBLIC CONVENIENCE.

Jurisdiction of Board — *Installation of Telephones in Railway*

Stations — *Exclusive Contract* — *Provincial Companies to be Bound by Contract* — *Fair and Reasonable Conditions* — *Railway Act*, sec. 245.] — See TELEPHONES, 1.

PUBLIC INTEREST.

Jurisdiction of Board — *Telephone Wires* — *High Tension Wires* — *Leave to Cross* — *Protective Measures* — *Federal and Provincial Companies* — *Railway Act*, sec. 246; 7 & 8 *Edw. VII.* ch. 61, secs. 1 and 5.] — See TELEPHONES, 2.

PUBLIC SAFETY.

See HIGHWAY CROSSINGS, 1.

QUANTITY.

"More or Less" — *Bill of Lading* — *Claim for Loss* — *Time* — *Breach of Contract.*] — See CARRIERS OF GOODS, 2.

RAILWAY ACT.

See STATUTES.

RAILWAY AND MUNICIPAL BOARD.

Entrance to Car — *Require Passengers to Enter by Rear of Car* — *Injury to Passenger Attempting to Enter by Front Door* — *Order.*] — See STREET RAILWAYS, 1.

RAILWAY CROSSING.

Jurisdiction of Board — *Contribution of Cost* — *Party Inter-*

ested — Municipality—Distance from Work.]—See JURISDICTION OF BOARD, 1.

RECEIPT.

Contract of Carriage — Lost Luggage — Condition Limiting Liability — Notice — Agents of Owner—Alteration of Oral Contract.]—See CARRIERS OF GOODS, 1.

REDUCTION OF TOLLS.

Disallowing Tariffs — Inter-switching Charges — Through Freight Traffic—Fair and Proper — High Grade Ore — High Toll — Less Traffic—Absorption—Variation of Order—Parties.]—See INTERSWITCHING CHARGES, 2.

REFUND.

Foreign Carrier — Joint Tariff — Classification — Exception — Continuous Route — Through Rate — Local or Special Commodity Rates — Excessive Rates—Railway Act, secs. 317, 321 (sub-secs. 2, 3, 4), 323, 333, 334, 336, 338.]—See TARIFF, 1; TOLLS, 8; INTERSWITCHING CHARGES, 1; TERMINAL CHARGES; EXPRESS COMPANIES, 2.

REFUSAL TO CARRY.

Dangerous Commodities—Jurisdiction of Board — Express Companies — Discretion—Railway Act, secs. 317, 348 to 354.]—See EXPRESS COMPANIES, 1.

RELATIVES.

Fatal Accidents Act—Excessive Damages—Death of Wife and Mother — R.S.O. 1897, ch. 166.] — See FATAL ACCIDENTS ACT.

RELEASE.

Workmen's Compensation.]—See MASTER AND SERVANT, 2.

RESERVATION BY CROWN.

Road Allowances — Highways Across Railways — Railway to Open and Bear Expense.]—See HIGHWAY CROSSINGS, 2.

RES IPSA LOQUITUR.

Workmen's Compensation Act.] — See MASTER AND SERVANT, 2.

RES JUDICATA.

Practice — Expropriation — Railway Act, sec. 220—Judgment of Court Acting Without Jurisdiction — Trespass—Nominal Damages — Costs.]—See EXPROPRIATION, 5.

RETROACTIVE ORDER.

See TERMINAL CHARGES.

RIGHT OF WAY.

Liability of Railway Companies for Fires — Railway Act, 1888, sec. 134; 1903, secs. 128, 239—Admissibility of Railway Map by the Appellate Court—Damages by Fire—Ignition of

Combustible Matter on Railway —Negligence.]—See FIRES, 1.

Absence of Fence — Damage to Crops — Fence Ordinance (N.W.T.).] — See ANIMALS AT LARGE, 1, 2.

ROAD ALLOWANCES.

Highways Across Railways—Railway to Open and Bear Expense—Reservation by Crown.] —See HIGHWAY CROSSINGS, 2.

SAME CONDITIONS.

See TOLLS, 4.

SEIZURE.

By Railway Company—Carriage of Goods—Seizure by Railway Company for Unpaid Tolls—Railway Act, secs. 3, 4 and 5—Seizure—Termination of Carriers' Lien — Demand — Conversion.] —See TOLLS, 1.

SIDING.

Agreement for Use of—Gate Left Open—Protection of Railway from Animals—Escape and Destruction of.]—See ANIMALS AT LARGE, 7.

SIMILAR DISTANCES.

See TOLLS, 4.

SPECIAL TARIFF.

Class Rate — Passenger and Special Freight—Excessive Tolls — Filed — Similar Distances —

Same Commodities — Another Railway Company — Similar Business — Express Tariff to be Filed—Deficient Car Service—Passenger Facilities — May Renew Complaints — Insufficient Information for the Board — Railway Act, secs. 2(a), 350.]—See TOLLS, 5.

STANDARD TARIFFS.

Passenger and Special Freight —Excessive Tolls—Filed—Similar Distances—Same Commodities—Special Class Rate Tariff—Another Railway Company — Similar Business — Express Tariff to be Filed—Deficient Car Service—Passenger Facilities—May Renew Complaints—Insufficient Information for the Board—Railway Act, sec. 2(a), 350.]—See TOLLS, 5.

STANDING BUSH.

Damage to—Fire from Locomotive—Conflicting Evidence — Findings of Jury—Railway Act, sec. 298 — Lands — Plantations — Interpretation of Statutes.]—See FIRES, 2.

STATED CASE.

Requirement of Plans—Railway Act, secs. 158, 177, 217, 220 — Expropriation — Injunction — Undertaking to Comply With the Act — Plan Filed of Land Subsequently Sub-divided — Practice — Appeal — Judgment — Persona Designata — Admis-

sion of Counsel.]—See **EXPROPRIATION**, 4.

STATION FACILITIES.

Provincial Railway—Jurisdiction of Board — Work for General Advantage of Canada—Foreign Railway—Operation in Canada—Through Traffic—Railway Act, secs. 2(21), 8(b).]—See **JURISDICTION OF BOARD**, 3.

STATUTES REFERRED TO.

Common Law Procedure Act, 1852,
sec. 40, p. 251
C.P.C., 549, 1067, p. 51
R.S.Q., 5164, p. 51
N.W.T., 1903, ch. 28, secs. 2, 7, pp. 1, 7
16 Vict. ch. 37, sec. 2, p. 27
16 Vict. ch. 37, sec. 3, p. 149
Railway Act, 1888, sec. 134, p. 140
R.S.O. 1897, ch. 160, sec. 3(5), p. 442
1897, ch. 160, sec. 9, p. 423
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1897, ch. 208, sec. 41(1), p. 270
Railway Act, 1903, secs. 128, 239, p. 140
R.S.C. 1906, ch. 1, sec. 15, p. 300
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secs. 128, 239, p. 140
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sec. 2(9), p. 214
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6 Edw. VII. ch. 42, p. 149
7-8 Edw. VII. ch. 61, secs. 1, 5
7-8 Edw. VII. ch. 61, sec. 9 and Pt. 1.
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7-8 Edw. VII. ch. 62, sec. 29, p. 201
8-9 Edw. VII. ch. 32, sec. 4, p. 478
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STOP-OVER PRIVILEGES.

Stop-over "for Orders" Privileges — Re-directed — Instructions — Point of Destination — Through Rate — Demurrage Charge — Stop-over Charge — Tariff Disallowed — Reasonable Rate.] — Upon a complaint

against a charge of one cent per hundred pounds made by the Canadian Pacific Railway Co. on grain and grain products in carload lots consigned to Cartier "for orders" and a like charge made by the Grand Trunk Ry. Co. on lumber and forest products in carloads from British Columbia consigned to Sarnia Tunnel "for orders."

It appeared that the railway companies had previously made no charge for this stop-over privilege, except a per diem charge of 25 cents a day for the first 48 hours' delay and the usual charge for demurrage of \$1.00 per day on cars delayed over 48 hours, and shippers were allowed to ship freight at a through rate to a certain intermediate point and there await further instructions from the consignee as to final point of destination.

Held, (1) That the tariff imposing the additional stop-over charge of 1 cent per hundred pounds should be disallowed.

(2) That this stop-over privilege was originally taken into consideration as an element in fixing a reasonable per diem rate and that a stop-over charge of 25 cents per diem per car for the first 48 hours, and the car service toll of \$1 a car for each additional 24 hours be substituted for the charge complained of. *Montreal Board of Trade (Transportation Bureau) and*

the Fullerton Lumber Co. v. Canadian Pacific and Grand Trunk Ry. Cos., 227.

Tolls—Interswitching Charges — Excessive — Through Rate and Balance Thereof — Absorption of Interswitching Tolls — Intermediate and Terminal Points — Tariffs to be Filed — Delivery in Transit — Refund.] —See INTERSWITCHING CHARGES, 1.

STREET RAILWAY.

1. *Negligence — Front Vestibule — Closing of — Requiring Entrance of Passengers by Rear of Car — Order of Railway and Municipal Board — Injury to Passenger in Attempting to Enter by Front Door — Terms of Order—Necessary to Give Notice of — Finding of Negligence on One Ground — Effect of Negating Negligence on Other Alleged Grounds.]—In compliance with an order made by the Ontario Railway and Municipal Board, the front platform of the defendants' cars was enclosed by a vestibule having a swing door, fastened by a spring lock on the inside, capable of being opened by the motorman to permit the exit of passengers. The plaintiff, not being aware of this order, attempted to get on a car so equipped at the front, and while so doing, the car started and she was thrown to the ground and injured. She asserted that the motorman saw her standing on the step, and*

notwithstanding started the car. There was no notice on the door notifying the public of the non-admission by that door. On a charge to the jury that they might find on one or all of the following grounds of negligence, namely, (1) the omission of a non-admittance notice, (2) starting the car while the plaintiff was on the step, and (3) in not opening the door and letting the plaintiff in, they found that the defendants' negligence consisted in the omission to have a non-admittance notice on the door, and did not make any finding as to the other alleged grounds of negligence.

The Divisional Court, on appeal to it, while holding that the ground of negligence found by the jury was not tenable, in that the company were merely obeying the Board's order, which did not require any such notice, directed a new trial on the other alleged grounds of negligence.

The Court of Appeal, while affirming the judgment of the Divisional Court as to the ground on which the jury found not constituting negligence, reversed the judgment granting a new trial, holding that the finding of the jury was tantamount to a finding negating negligence on the other alleged grounds. *McGraw v. Toronto R.W. Co.*, 97.

2. Negligence — Duty of Company to Put on Wheel Guards —

Damages — New Trial.—(1) It is negligence in a company operating electric cars on the streets of a city not to have such guards for the front wheels as will prevent persons falling on the tracks from being run over, and the company will be liable in damages to any person injured in consequence of such negligence, unless there is sufficient contributory negligence on the part of such persons to constitute a defence.

(2) No such contributory negligence could be attributed to a child under six years old.

(3) A verdict for \$8,000 damages in such a case, where one of the child's legs was cut off, is not so excessive as to warrant the Court in ordering a new trial. *Wald v. Winnipeg Electric R.W. Co.*, 126.

3. New Trial — Misdirection — Questions for Jury — Verdict on Issues—Damages.—An order for a new trial should not be granted merely on account of error in the form of the questions submitted to the jury where no prejudice has been suffered in consequence of the manner in which the issues were presented by the charge of the Judge at the trial and the jury has passed upon the questions of substance.

The judgment appealed from (18 Man. L.R. 134) was affirmed, the Chief Justice dissenting, and

Davies, J., *hesitante*, as to the quantum of the damages awarded. *Winnipeg Electric R.W. Co. v. Wald*, 129.

4. *Assumption of Ownership by Municipality — Award of Arbitrators—Principle of Valuation — Allowance for Value of Franchise—Allowance for Compulsory Taking — Street Railway Act, sec. 41.*]—Arbitrators were appointed under the Street Railway Act, R.S.O. 1897, ch. 208, to determine the value of the appellants' railway and all real and personal property in connection with the working thereof, the ownership of which had been assumed, under the provisions of sec. 41(1) of the Act, by a town corporation, part of the railway being laid within the town.

The arbitrators in their award fixed on a certain sum as "the actual present value of the railway and of the real and personal property in connection with the working thereof." and stated that in arriving at that value they had "valued the railway as being a railway in use and capable of being used and operated as a street railway," and that they had "not allowed anything for the value of any privilege or franchise whatsoever" in either of the municipalities in which the railway was laid. They further stated that they had not been able to assent to the con-

tention of the company that the proper mode of valuation should be to capitalize the amount of the permanent net earning power of the railway, and that they had not reached their valuation in any way on that basis, but had "considered only the actual present value."

Held, Moss, C.J.O., dissenting, that the arbitrators had erred in their method of valuation, and that in the case of a railway producing, as the appellants' railway did, a considerable permanent profit, the proper method of valuation was to take its net permanent revenue and capitalize that, the result representing its real value.

Stockton and Middlesborough Water Board v. Kirkleatham Local Board, [1893] A.C. 444, distinguished.

Right of owner to allowance of 10 per cent. as for compulsory taking discussed.

Judgment of Britton, J., reversed, and award remitted to the arbitrators for reconsideration. *Berlin and Waterloo Street R.W. Co. v. Town of Berlin*, 271.

SUBSTITUTION.

Of Stile Over Railway Crossings — Jurisdiction of Board — Highway Crossings — Not Legally Closed — Acquiescence by City and Public — Order — Review, Rescind or Vary — Reasonable Convenience of the Pub-

lic — Conditions as to Safety — Highway to be Kept Open — Railway to Construct — City to Maintain and Make Safe.]—*See* HIGHWAY CROSSINGS, 1.

SWITCHING CHARGES.

Absorption — Competition Plants — Similar Treatment — Special Charge — Railway Act, 315(4).]—*See* TOLLS, 9.

TARIFF.

1. *Classification — “Exception” — Joint Tariff — Continuous Route — Through Rate — Local or Special Commodity Rates — Excessive Rates — Foreign and Canadian Carriers — Refund—Railway Act, secs. 317, 321, (sub-secs. 2, 3, 4), 323, 333, 334, 336, 338.*]—An application was made to the Board under the foregoing sections of the Railway Act, to ascertain the legal rate on crude oil from Stoy, Indiana, to Toronto.

The Indianapolis Southern Railway Company, on whose line Stoy is a station, filed with the Board on December 19th, 1906, a joint tariff making the joint fifth class rate twenty cents per hundred pounds from Stoy to Toronto.

Prior to January 1st, 1907, crude oil had no classification, but on that date the official classification coming into force in the United States placed it in the fifth class, this classification

being used by the Grand Trunk Railway Company.

Prior, however, to the coming into force of this classification the Grand Trunk Railway Company on November 30th, 1906, issued and filed with the Board an “exception” refusing to honour on petroleum and its products the fifth class rate from points in the United States to points in Canada, and provided that on such traffic from frontier or junction points the local or special commodity rates would govern.

The Grand Trunk Railway Company admitted that the joint rate was not unreasonable or unprofitable to them and that the local rate was intentionally made excessive to keep out oil from the United States.

Held, (1) That the “exception” filed by the Grand Trunk Railway Company had no effect and the procedure provided by the Railway Act, sec. 338, must govern.

(2) That if a railway company in the United States without the approval of the connecting carrier in Canada files a joint tariff in which the latter does not desire to participate, the Canadian company should apply under sec. 338 to have it disallowed and if this is not done, then the tolls provided in such joint tariff are the only tolls that can be charged until

such tariff is superseded or disallowed by the Board.

(3) That if the Canadian railway company desires any change to be made in any classification used in the United States for such joint tariff, it should apply under sub-sec. 4, sec. 321.

(4) That the legal rate chargeable on the shipments in question is twenty cents per hundred pounds and that the Grand Trunk Railway Company should be at liberty to refund the difference between such rate and the sum collected by it. *British American Oil Co. v. Grand Trunk Ry. Co.*, 178.

2. *Jurisdiction — Reasonable Tolls — English, Canadian and Foreign Railway Companies — Joint Tariff—Filing with Board —Continuous Route — Through Traffic — Construction, Operation — Control — Traffic by Water — Foreign Port — Railway Act, secs. 2(21), 8(b), 333 (3), 335, 336—8 & 9 Edw. VII. ch. 32, sec. 11.*—The complainants alleged that the respondents, the White Pass & Yukon Ry. Co., were charging excessive tolls for transporting traffic by a land and water route (known as the White Pass & Yukon route) from Skaguay in Alaska through a portion of British Columbia to White Horse in the Yukon Territory and thence by water to Dawson.

The respondents were incorporated in England and holding all the stock of, owned, controlled and operated the Pacific & Arctic, the British Columbia, Yukon and the British Yukon Ry. Cos., the first incorporated in the State of West Virginia, the second in the Province of British Columbia, and the third in the Dominion of Canada, and also the British Yukon Navigation Company, authorized to operate steamers on the Yukon River leading from White Horse to Dawson.

Held, (1) That under sec. 336 of the Railway Act, the Board had power to order the various railway companies and the controlling railway to file a joint tariff for the land portion of the route from Skaguay to White Horse.

(2) That the British Yukon Ry. Co. could be called upon to file a joint tariff for the continuous route from Skaguay to White Horse.

(3) That the British Columbia Yukon, a provincial railway connecting with the British Yukon, a Dominion railway, is by sec. 8(b), as regards through traffic carried over it, subject to the Railway Act.

(4) That the Board had jurisdiction under sec. 336 to call upon the White Pass and Yukon Ry. Co. to require the Pacific and Arctic Ry Co., a foreign railway, to enter into the neces-

sary agreements for filing a joint tariff for the said route.

(5) That the Board itself under the recent amendment to the Railway Act (8 & 9 Edw. VII. ch. 32, sec. 11), might require the Pacific and Arctic to enter into such agreements.

(6) That the respondents as controlling and operating the two Canadian Ry. Cos. (authority to construct or operate not being required) are by the said amendment made subject to the Railway Act.

(7) That the Board had no jurisdiction over the tolls of traffic delivered to the respondents at Skaguay destined to Dawson, the water route between White Horse and Dawson not being part of a "continuous route in Canada" under sec. 333.

(8) That under sec. 338, sub-sec. 2, the Board had power to disallow or otherwise deal with the tolls in such joint tariff.

(9) That the question of reasonable rates should be dealt with after the joint tariff has been filed. *Dawson Board of Trade v. White Pass & Yukon Ry. Co. et al.*, 190.

3. *Joint Tariff — Competition — Intermediate Point — Continuous Route — Basing Point — Collection of Tolls Illegal — Railway Act, secs. 314(5), 315(5), 335.]*

—On a complaint that the Great Northern Railway Company charged higher tolls from Nelson

to Gateway, B.C., than from the same point to Fernie, B.C., or Spokane, in the United States, the distance from Nelson to Fernie, via Canadian Pacific short line, being 197 miles, by Great Northern 476 miles.

The goods were shipped from Nelson (the basing point) at a toll based on a combination of tolls on Spokane, thereby making a joint tariff and through toll by a continuous route over Canadian and foreign lines.

A joint tariff at a through rate over a continuous route between Gateway and Nelson, B.C., had not been filed as required by sec. 335.

Held, that under sec. 315(5) of the Act, although Gateway is an intermediate point, Fernie is a competitive point; the charging of a higher local toll to Gateway than the through toll to Fernie was not a violation of this sub-section.

Held, that under secs. 314(5) and 335 of the Act, the failure to file a joint tariff with the Board, rendered the collection of tolls illegal. *Bonnars' Ferry Lumber Co. v. Great Northern Ry. Co.*, 504.

TARIFF DISALLOWED.

See STOP-OVER PRIVILEGES; TOLLS, 8.

TELEGRAM.

Contract by — Carriage by Water — Bill of Lading — Weights and Measures—Cana-

dian or American.]— See BILL OF LADING.

TELEGRAPH TOLLS.

Marconi Wireless—Press and Private Messages — Excessive Discriminatory Rates.] — See TOLLS, 4.

Not Unreasonably High—Filing Tariffs — Discrimination — Press Despatches — Traffic — Passing Over Same Portion of the Line of Railway—Toll or Rate—Railway Act, 314(5), 315, 7 & 8 Edw. VII. ch. 61, sec. 9.] —See TOLLS, 7.

TELEPHONES.

1. *Jurisdiction — Installation of Telephones in Railway Stations — Public Convenience — Exclusive Contract—Provincial Companies to be Bound by Contract—Fair and Reasonable Conditions—Railway Act, sec. 245.] —Upon application to the Board by the P. and C. telephone companies for an order compelling certain railway companies to permit the installation and maintenance in railway stations of telephones.*

Held, (1) That under sec. 245 of the Railway Act, the Board has jurisdiction to grant the order applied for and may impose such terms as it deems best and expedient but should not take into consideration any contract giving exclusive privileges to any other telephone company.

(2) That the only point to be considered by the Board is whether such telephone connection will be of benefit and convenience to the public having business with the railway company.

(3) That telephone companies who may be entitled to such an order being usually incorporated by the province, and thus not subject to the jurisdiction of the Board should enter into a contract containing fair and reasonable conditions to be prescribed by the Board. *Peoples' and Caledon Telephone Cos. v. Grand Trunk and Canadian Pacific Ry. Cos.*, 161.

2. *Jurisdiction — Leave to Cross—Federal and Provincial Companies—Telephone Wires—High Tension Wires—Protective Measures — Public Interest — Railway Act, sec. 246—7-8 Edw. VII. ch. 61, secs. 1, 5.]—Application by the Bell Telephone Company, under sec. 246 of the Railway Act, and sec. 5 of 7-8 Edw. VII. ch. 61, for an order restraining the Nipissing Power Company, of Toronto, Ontario, from crossing the wires of the applicant, between Powassan and North Bay along the highway, known as the Nipissing Road, with their high tension wires, until permission of the Board shall have been obtained.*

Held, (1) That the order should be granted; the provision for protective measures being in the public interest.

(2) That under sec. 246 of the Railway Act, power companies are required to obtain leave from the Board, before crossing railways with their wires, in order that the wires may be properly guarded.

(3) That under the broad provisions of sec. 5, of the Amending Act, 7-8 Edw. VII. ch. 61, it is reasonable that the provisions of sec. 246 should apply to a telephone system, as well as to a railway line.

(4) When a provincial company desires to cross with its line, the line of a Federal company, subject to the jurisdiction of the Board, it must obtain leave from the Board before it will be allowed to do so. *Bell Telephone Co. v. Nipissing Power Co.*, 472.

TELEPHONES IN STATIONS.

Installation of — Jurisdiction of Board—Public Convenience—Exclusive Contract—Provincial Companies to be Bound by Contract—Fair and Reasonable Conditions—Railway Act, sec. 245.]—See TELEPHONES, 1.

TENANCY AT WILL.

Expropriation — Compensation—Persons Interested — Renewable Lease — Occupation After Expiration of Term Without Renewal—Right to Renew for Part — Railway Act, sec. 155.]—See EXPROPRIATION, 3.

TERMINAL CHARGES.

Export Traffic — Terminal Charges — Absorption — Separate and Joint—Rail and Ocean Bill of Lading—Competition Between Ocean Ports and Carriers —United States and Canada — Inward Cartage—Unreasonableness and Unjust Discrimination —Refunds — Parity in Tolls — Advance in Freight Tolls—Competition of Markets—Increase in Cartage Charges — Increased Costs of Service — Retroactive Order.]—Application (1) that the exporter of cheese in Montreal should be placed upon as favourable basis as to terminal charges at the port of Montreal on his export traffic as his competitor west of Montreal, (2) that freight tolls on cheese should be put on a parity with those on bacon, (3) complaining of alleged advances in freight tolls.

It appeared that cheese may be shipped direct to transatlantic ports from Ontario points via Montreal on a joint rail and ocean bill of lading, or shipment might be made on a separate rail and ocean bill of lading to Montreal for storage and subsequent export.

In the first case cheese shipments are switched direct to the steamship piers, the wharfage and Port Warden's fees being absorbed by the railway companies to meet the competition

between Canadian and United States ports and carriers.

In the second case the cheese is carted from the cars to the warehouse of the exporter and again from the warehouse to the steamship piers.

The Montreal exporter is charged for inward cartage, *i.e.*, from cars to warehouse, wharfage and Port Warden's fees, these two latter charges are absorbed in the case of his western competitor.

Held, (1) That the Montreal exporter should not be placed upon a more favourable basis than his western competitor.

(2) That no comparison could be made between switching charges and inward cartage charges in order to reduce the latter, these cartage charges were not shewn to be unreasonable and unjustly discriminatory and the portion of the complaint as to inward cartage charges should be dismissed.

(3) But, *held*, also, that so long as the port charges are absorbed on shipments on joint rail and ocean bills of lading these charges should also be absorbed on shipments on separate rail and ocean bills of lading for subsequent export, as the services are identical in each case, and that a tariff embodying these provisions should be filed.

(4) That the application to put cheese and bacon on a parity should be dismissed, this being

a phase of the competition of markets, and the railway companies have it in their discretion whether or not to make tolls to meet the competition of markets.

(5) That the complaint of the advance in freight tolls should be dismissed, the cartage charges being really attacked and it has been shewn to be due to increased cost of service which the shipper or consignee does not pay entirely but a portion is paid by the railway companies.

(6) That the application for refunds should be refused, being only allowed when provided for in the tariffs, and the Board has no power of retroactive action.

Brant Milling Co. v. Grand Trunk Ry. Co. (The Brant Milling Co.'s Case), 4 Can. Ry. Cas. 259; *Lancashire Patent Fuel Co. v. London & North Western Ry. Co.*, 12 Ry. & C. Tr. Cas. 79, and *Lasalle Paper Co. v. Michigan Central Ry. Co.*, 16 I.C.C. Rep. 149, followed. *Montreal Produce Merchants' Association v. Grand Trunk and Canadian Pacific Ry. Cos.*, 232.

THIRD-CLASS FARE.

16 Vict. ch. 37, sec. 3—*Railway Act—Construction.*] — See TOLLS, 2.

THROUGH RATE.

And Balance Thereof—Tolls—Interswitching Charges—Ex-

cessive — Stop-over Privilege — Absorption of Interswitching Tolls—Intermediate and Terminal Points—Tariffs to be Filed —Delivery in Transit—Refund.] —See INTERSWITCHING CHARGES, 1.

THROUGH TRAFFIC.

Through Shipments.] — See DISCRIMINATION, 1.

Provincial Railway — Jurisdiction of Board — Work for General Advantage of Canada—Foreign Railway—Operation in Canada — Station Facilities — Railway Act, secs. 2(21), 8(b).] —See JURISDICTION OF BOARD, 3.

Disallowing Tariffs — Interswitching Charges — Reduction of Tolls—Fair and Proper — High-grade Ore—High Toll — Less Traffic — Absorption — Variation of Order—Parties Interested.]—See INTERSWITCHING CHARGES, 2; DISCRIMINATION, 1; STOP-OVER PRIVILEGES; TARIFF, 1, 2.

TIME.

Bill of Lading—Condition — Breach of Contract—Claim for Loss — Quantity — “More or Less.”]—See CARRIERS OF GOODS, 2.

TOLLS.

1. *Railway — Carriage of Goods — Delivery to Consignee*

—Seizure by Railway Company for Unpaid Tolls—Dominion Railway Act, sec. 345—“Seize” —Termination of Carrier’s Lien — Demand — Conversion — Damages.]—By sec. 345 of the Dominion Railway Act, R.S.C. 1906, ch. 37, a railway company may, instead of proceeding by action for the recovery of tolls upon goods carried, “seize the goods for or in respect whereof such tolls are payable, and may detain the same until payment thereof,” etc.

Held, that a railway company are not, by this enactment, given a lien on property carried, to such an extent and of so general and wide an application as to allow them to re-take goods which have been delivered, and as to which the ordinary carrier’s lien has terminated; the section does nothing more than confirm and establish the carrier’s lien; there is the right to seize and detain, but the right must be exercised and enforced before there is an absolute and unconditional delivery of the goods to the consignee.

Semble, that in this case there was not a sufficient demand for the tolls due to the defendants, on account of which they seized goods which they had previously delivered to the consignee, the demand being for a gross sum, including a sum for tolls.

Held, also, that the defendants, having converted the goods,

were liable for damages; and the measure was the value of the goods. *Clisdell v. Kingston and Pembroke R.W. Co.*, 73.

2. *Province of Canada*, 16 Vict. ch. 37, sec. 3—*Dominion Railway Act*, 1906 (6 Edw. VII. ch. 42)—*Construction*.]—Section 3 of 16 Vict. ch. 37 (Province of Canada), is not inconsistent with or impliedly repealed by the *Dominion Railway Act*, 1906 (6 Edw. VII. ch. 42).

Accordingly the appellants are bound to carry third-class passengers for the fare of a penny per mile, and to provide one train every day with third-class carriages between Toronto and Montreal. *Grand Trunk R.W. Co. v. Robertson*, 149.

3. *Rates on Citrus Fruits from California — Competition of Railways and Markets in United States — Blanket Rates — Local and Proportional Rates — Unreasonable Rates — Discrimination — Fair and Reasonable Rates — New Tariffs With Connections in United States*.]—Complainants alleged that the rates charged by the respondents on shipments of citrus fruit from points in California, United States, to Regina were unreasonable as compared with the rates charged from the same points to Winnipeg and other points in Manitoba and Ontario.

At the time the complaint was heard the rate to Regina on

citrus fruits via Kingsgate, British Columbia, was \$1.70 per 100 pounds made up of the full local rates in United States territory with a proportional rate over the Canadian Pacific Railway. Before the opening of the Kingsgate route the rate to Regina via Emerson and Winnipeg was \$1.72, when the Kingsgate route was opened this rate was reduced to \$1.60 via Kingsgate, and was afterwards raised to \$1.70.

On account of the competition of railways and markets in the United States the blanket rate to Missouri river common points from shipping points in California is \$1.15, and the rate to Winnipeg is \$1.25.

Held, (1) That the advantage in rates of Winnipeg over Regina is not unreasonable.

(2) That the former rate of \$1.60 to Regina was fair and reasonable and should be restored.

(3) That the respondents should be required to arrange for the publication of new tariffs with its connections from California shipping points to Regina via Kingsgate or Emerson on basis of \$1.60 per 100 pounds on oranges in straight carloads, or on mixed carloads of oranges and lemons, and \$1.45 per 100 pounds on lemons in straight carloads. *Stockton & Mallinson v. Canadian Pacific Ry. Co.*, 165.

4. *Telegraph Tolls — Marconi Wireless System — Press and Private Messages — Excessive and Discriminatory Rates.*]

—An application was made to the Board for an order directing certain telegraph companies to transmit press messages to the Marconi wireless station at Glace Bay at the same rate as to other points along the Atlantic coast of Canada from the City of Ottawa.

It was alleged that the rates were excessive and discriminatory because the telegraph companies on messages to Glace Bay charged the higher private rate rather than the lower press rate.

Held, that the evidence did not establish that excessive or discriminatory rates were charged, the rates being lower from Ottawa to Glace Bay than from the same point to other Canadian Atlantic coast points and the application must be dismissed. *Times Publishing Co. v. Canadian Pacific Ry. Co., Great North Western & Western Union Telegraph Cos.*, 169.

5. *Excessive Tolls—Passenger Fares—Standard Passenger and Special Freight Tariffs — Filed — Similar Distances — Same Commodities — Special Class Rate Tariff — Parity in Rates — Another Railway Company—Similar Business — Express Tariff to be Filed — Deficient Car Service — Passenger Facili-*

ties—May Renew Complaints—Insufficient Information for the Board—Railway Act, secs. 2(9), 350.]—Complaint that the respondent corporation charged excessive passenger, freight and express tolls, and did not furnish sufficient car service and passenger facilities.

The respondent corporation operate a railway and collieries; own large areas of irrigated lands and town lots, and is the result of amalgamation of the Alberta Railway and Coal, Canadian North West Irrigation, St. Mary's River Railway, Alberta Railway and Irrigation Companies.

Counsel for the respondent contended that the tolls should not be reduced and greater facilities furnished, because the railway and irrigation works did not pay, and the land and coal areas covered the deficits.

The Canadian Pacific Railway Company recently acquired a controlling interest in the respondent corporation, and will probably operate its railway.

Held, (1) That there was no evidence that the railway did not pay.

(2) That the respondent corporation be required to file within a specified time, (a) standard passenger tariffs charging three cents per mile and one-sixth less for round trip tickets, (b) special tariffs of freight rates between all the stations on a basis

that shall not exceed those of the Canadian Pacific for the same or similar distances and on the same commodities, (c) a special tariff of class rates not higher than the same tariff of the Canadian Pacific Railway for the same or the nearest equivalent distances, and (d) express tariff of tolls as required by sec. 350 of the Railway Act.

(3) That the complaints relating to the respondent's express service and charge should stand for disposition until the general express enquiry is dealt with.

(4) That the complaint as to deficient car service and passenger facilities may be renewed if necessary at the expiration of six months. *Cardston Board of Trade v. Alberta Railway and Irrigation Co.*, 214.

6. *Excessive Tolls — Water Competition — Compelled Rate — Normal Rates — Discretion of Railway Company — Intermediate Point — Shorter and Longer Distances — Traffic — Important in Amount — Railway Act, sec. 315(5).*—On a complaint to the Board under sec. 315(5) of the Railway Act, that the rate on a shipment of apples from Picton to Smith's Falls was excessive as compared with the rate from Picton to Ottawa; Smith's Falls being an intermediate point located on the Rideau Canal and the distance from Picton to Smith's

Falls being shorter than the distance from Picton to Ottawa.

Held, (1) That the complaint should be dismissed, the rate to Ottawa being a compelled rate based on water competition.

(2) That a shipper could not demand less than normal rates on account of water competition which a railway company, in its own interest did not choose to meet. *Plain and Company v. Canadian Pacific Ry. Co.*, 222.

7. *Telegraph Tolls — Not Unreasonably High—Filing Tariffs —Unjust Discrimination—Press Despatches — Traffic — "Passing Over the Same Portion of the Line of Railway"—"Toll" or "Rate"— Railway Act, 314(5), 315—7 & 8 Edw. VII. ch. 61, sec. 9—7 & 8 Edw. VII. ch. 61, Part. 1.*—Application by the Western Associated Press for reduction of rates charged by the respondents for press despatches, alleging an unjust discrimination in favour of the respondents' customers. The rates charged from points in Eastern Canada to respondents' customers were one cent per word for day service and one-half cent per word for night service, subject to a rule that those rates are "special for publication at point addressed in one newspaper only." The rates charged to the applicants for the same service were one and one-half cents for day and

three-quarters of a cent for night despatches.

Held, (1) That the rate made for one class, a single newspaper, should not be arbitrarily applied to another class, an association of newspapers; the different rates not being in themselves unreasonably high.

(2) That telegraph companies are brought under the jurisdiction of the Board by 7 & 8 Edw. VII. ch. 61, Part 1, and their tariffs must be approved by it under sec. 314(5) of the Railway Act.

(3) That these tariffs must be so framed as not to work unjust discrimination against the applicants, or any other person or association, engaged in like work.

(4) That sec. 315 would have no application whatever, unless the traffic (press despatches) in question passed over the same portion of the telegraph line from start to finish.

(5) That under sec. 9 of 7 & 8 Edw. VII. ch. 61, the definition of "toll" or "rate" has equal application to railway, telegraph and telephone companies. *Western Associated Press v. Canadian Pacific Railway and Great North Western Telegraph Cos.*, 482.

8. *Jurisdiction — Tariff—Increase in Tolls — Refund.*]—On a complaint that the tolls on wood pulp should be reduced

from three cents per hundred pounds in carloads to two cents the latter rate having been in force for many years, and for a rebate of tolls paid under the former tariff.

The railway company submitted that the increase was justified on account of the increased cost of operation and that the former toll did not give sufficient revenue to pay operating expenses.

Held, upon the evidence, that the increased toll should be disallowed; the two cent toll being fair and reasonable.

Held, that the increased toll being lawful according to the tariff in force when the complainant's shipments moved, the Board had no jurisdiction to grant a refund. *Davy v. Niagara, St. Catharines and Toronto Ry. Co.*, 493.

9. *Switching and Handling Traffic — Fixing Tolls — Absorption — Competitive Plants — Similar Treatment — Special Charge — Railway Act, sec. 315(4).*] — Application of the railway company to fix the toll for switching and handling traffic to and from the respondents' spur, two and a half miles north of Hespeler. The applicants relied on a similar order made in the case of the Pilon spur on the Canada Atlantic Railway near Casselman, where an additional charge of

\$3.00 per car was allowed, on the increased cost of construction, on the increased cost of operation on account of grade, and that the \$3.00 per car which the respondents had paid under protest did not cover cost of operation. The respondents contended that they were not bound by the Pilon order, of which they had no notice, there was a discrimination of \$6.00 per car as compared with free service to competitive plants between stations on the line from Guelph to Galt.

Held, that under sec. 315(4) of the Railway Act it is required that all competitive industries should be treated alike.

Held, that the railway company were not entitled to make an extra charge for switching services. *Grand Trunk Ry. Co. v. Christie, Henderson & Co.*, 502.

Switching Charges — Absorption — Competition Plants — Similar Treatment — Special Charge—Railway Act, 315(4).]
—See TOLLS, 9.

Interswitching Charges — Excessive — Through Rate and Balance Thereof — Stop-over Privilege — Absorption of Interswitching Tolls — Intermediate and Terminal Points — Tariffs to be Filed — Delivery in Transit — Refund.]
—See INTERSWITCHING CHARGES, 1; DISCRIMINATION, 2.

TORT.

Action of, for Personal Injuries to Wife.]
—See CARRIERS OF PASSENGERS, 1.

TRAMWAY.

Operation of — Negligence — Injury to Infant — Regulations — Running of Car.]
—See INFANT, 1.

TRESPASS.

Practice — Expropriation — Railway Act, sec. 220 — Judgment of Court Acting Without Jurisdiction — Nominal Damages — Costs — Res Judicata.]
—See EXPROPRIATION, 5.

UNDERTAKING TO COMPLY WITH ACT.

Requirement of Plans — Railway Act, secs. 158, 177, 217, 220 — Expropriation—Plan Filed of Land Subsequently Sub-divided — Practice — Appeal — Judgment — Persona Designata — Stated Case — Admission of Counsel.]
—See EXPROPRIATION, 4.

UNREASONABLE RATES.

Competition of Railways and Markets in United States — Blanket Rates — Local and Proportional Rates—Discrimination — Fair and Reasonable Rates—New Tariffs With Connection in United States.]
—See TOLLS, 3.

VALUATION.

Principle of — Allowance for Value of Franchise — Allowance for Compulsory Taking — Street Railway Act, sec. 41.]— See STREET RAILWAYS, 4.

VESTIBULE.

Street Railway Closing of— Require Entrance of Passengers by Rear of Car — Order of Railway and Municipal Board— Terms of Order — Injury to Passenger Attempting to Enter by Front Door—Necessity to Give Notice to — Finding of Negligence on One Ground — Effect of Negativig Negligence on Other Alleged Grounds.]— See STREET RAILWAYS, 1.

WATER COMPETITION.

Discrimination — Unreasonable Tolls — Equality Clause — Mileage — Main and Branch Lines Mileage—Compelled Rate —Railway Act, secs. 315, 334.]—See DISCRIMINATION, 2.

Excessive Tolls — Compelled Rate — Normal Rates — Discretion of Railway Company — Intermediate Point — Shorter and Longer Distances — Traffic — Important in Amount.] — See TOLLS, 6.

WEIGHTS AND MEASURES.

Carriage by Water — Bill of Lading — Bushel — American or Canadian—Compulsory Pay-

ment — Freight — Action for Excess — Contract by Telegram.]—See BILL OF LADING.

WHEEL GUARDS.

Duty of Company to Put on— Damages — New Trial.] — See STREET RAILWAYS, 2.

WIRE CROSSINGS.

Jurisdiction of Board — Telephone Wires — High Tension Wires — Leave to Cross — Protective Measures — Public Interest — Federal and Provincial Companies — Railway Act, sec. 246; 7 & 8 Edw. VII. ch. 61, secs. 1 and 5.] — See TELEPHONES, 2.

WORDS AND PHRASES.

“Absorption.”] — See INTER-SWITCHING CHARGES, 1, 2.

“Basing Point.”] — See TARIFF, 3.

“Compelled Rate.”] — See DISCRIMINATION, 2; TOLLS, 6.

“More or Less.”]—See CARRIERS OF GOODS, 2.

“Review, Rescind or Vary.”] —See JURISDICTION OF BOARD, 2; HIGHWAY CROSSINGS, 1.

“Wireless.”]—See TOLLS, 4.

WRONG BILLING.

Jurisdiction of Board — Express Company — Company's Agent — Provincial Courts — Excessive Tolls — Refund.]— See EXPRESS COMPANIES, 2.

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